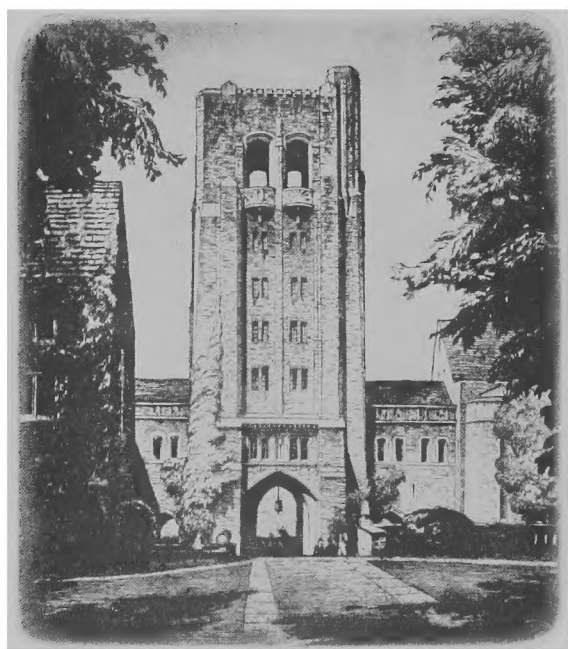


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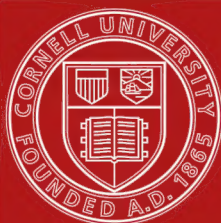
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ADDISON ON CONTRACTS:
BEING
A TREATISE
ON
THE LAW OF CONTRACTS.

BY C. G. ADDISON, Esq.,
AUTHOR OF THE "LAW OF TORTS."

EIGHTH EDITION.

BY HORACE SMITH,
OF THE INNER TEMPLE, ESQUIRE, BARRISTER-AT-LAW, RECORDER OF LINCOLN.

With American Notes
BY BENJAMIN VAUGHAN ABBOTT.

Brought down to Date
BY HORACE G. WOOD.

VOL. I.

BOSTON:
CHARLES H. EDSON & CO., PUBLISHERS.
1888.

B108071

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PREFACE

TO SECOND AMERICAN EDITION.



THE excellence of the work of Mr. Addison as a legal writer is too well established to need one word of commendation from me. His treatise upon the "Law of Torts" is standard authority in all of our courts, and is more often cited than any other book upon the subject. This work was prepared by him with the same care as that bestowed upon "Torts," *and it has always been regarded by myself as the most thorough, exhaustive, and practical work upon the subject* known to the profession. I have used it almost entirely during my practice, and have always found it *accurate, reliable, and practical*. There is but little difference in the law relating to contracts as administered in the courts of England and this country, and this work will be found as useful to American as to English lawyers.

My attention has been directed mainly to those branches of the topics that are of the most practical value to the profession. If ample time had been given me in discharging the duty of editor, I could have satisfied myself and my professional brethren much better than I have. But I have done the best

I could, in view of the demands made upon my time by professional engagements. Irrespective of the notes, I can recommend the book to the profession as one of great merit.

My notes are appended to the book, and will be found in the last volume. They are designated by numerals, and in all cases where there is no note corresponding with a numeral indicating a reference the numeral may be understood as referring to the Appendix.

The notes are numbered consecutively from 1 to 100, or to whatever point the number of notes may be carried, so that no confusion can arise.

H. G. WOOD.

NEW YORK, Dec. 15, 1887.

PREFACE

TO THE AMERICAN EDITION.

THAT ADDISON ON CONTRACTS is a work of high value and reputation appears from the nature of its subject-matter and the facts that it has reached an eighth edition in England and that three editions have heretofore been published in this country. It has received warm encomiums both from active practitioners and critics in both countries.

The slightest comparison of the eighth English edition with the seventh shows that the first-mentioned contains large additions; they are estimated at nearly 40 per cent. The explanations given by MR. HORACE SMITH, the English editor, in his Preface to the eighth edition, show that he has added nearly two thousand cases, and that the work in its new form, exclusive of Indices, &c., is lengthened about two hundred pages, notwithstanding much condensation of former matter. He thus describes some of his additions, —

“The present edition has been considerably altered and enlarged. The first chapter, which deals with the nature and decisions of contracts in general, has been in some measure recast, with a view to greater clearness and perspicuity. The

chapter on the 'Contract of Letting' (in which is contained the law of Landlord and Tenant) has been made more complete by the introduction of the subjects of 'waste,' 'rights to fixtures,' and 'duties of innkeepers,' and by the addition of a whole section on the law of 'Distress for Rent.' Some statement of the law relating to negligence in the performance of contracts for Work and Services, and other contracts, has been added to the present edition. The effect of fraud, deceit, or misrepresentation upon contracts, the law with respect to mandamus to public companies and local boards, questions of Specific Performance and Injunctions, the right of lien of bailors, bailees, and others, have received fuller consideration. The section upon 'Carriers' has been very considerably enlarged, by dealing more exhaustively than in previous editions with the duties of carriers in the carrying of passengers or goods, and in the forwarding and delivering of the latter."

The American Notes have been framed with study and labor, and with a care in the selection of topics which may need to be explained. Addison on Contracts is a work of immense scope, embracing not only principles applicable to contracts generally, such as a practitioner would naturally expect to find in a work entitled "on Contracts," but also a concise, detailed statement of the law of all the important particular contracts, of Landlord and Tenant, Bailments, Master and Servant, Agency, Carriers, especially by vessel or railroad, Mortgages, both of real and personal property, Suretyship, Insurance, marine, fire, and life. Bills, Notes, and Cheques, Partnership, Joint-Stock Companies, Marriage, Sales of real or personal property, and several others. Upon these various subjects there is an immense accumulation of American decisions, any complete exposition of which, in notes, would fill four or five volumes additional to Addison's

text. Moreover, there are in this country distinct text-books on these topics which are widely in use. Few lawyers would turn to the foot-notes of an English treatise on Contracts for details of the American law on the subjects mentioned. The plan pursued has therefore been to give reasonably full annotation under those parts of the work which treat of the law of contracts generally, but beneath those which treat of the particular contracts, to refer the reader to recent sources of full information, — to the chief text-books, titles in the Digests, and essays in the law magazines on the subjects discussed in the text, adding a mention of such decisions as have appeared since the general date of the writings cited. Yet special attention has been given to topics on which the law of this country is different from that of England, or on which there have been recent changes or developments here. On such matters an American reader who should follow Addison's text only, might be misled, or at least would lack recent and important information ; for this reason they have been thought to need full notes. Examples of notes of this character are : those upon * p. 56, on contracting by telegraph ; * p. 67, on formalities of contracting with the United States Government ; * p. 87, on liberty of American corporations to contract without seal ; * p. 105, on contract-powers of national banks ; * p. 194, on the construction, by courts of one State, of contracts made in another ; * pp. 419, 519, on transportation of explosives ; * pp. 519, 520, on obligations, rights, and liabilities relative to special railroad cars, such as drawing-room and sleeping cars, ladies' cars, smoking cars, cattle cars, &c. ; * p. 541, on the right

of common carriers to limit their common law liability by special contract or notice ; * p. 805, on the parallel between English joint-stock companies and American business corporations ; * p. 989, on conditional sales ; and there are many others. Upon the whole, the judicious reader will easily perceive that more extended annotation could not have been made without either omitting some of the English chapters, or enlarging the work to three volumes.

It is proper to add that the labor and responsibility of the undersigned have been limited to the preparation of the American Notes and the American Table of Cases. The English portions of the work are simply a faithful reprint of the original.

BENJ. VAUGHAN ABBOTT.

NEW YORK, Jan. 1883.

PUBLISHERS' NOTE.

IN order to facilitate verification of English references, the English paging is given at the top of the pages in this edition, and the points of division are indicated by stars in the text.

The paging adopted for the American edition will be found at the bottom of the pages. The references in both Tables of Cases, and in the Index, are to this new or bottom paging.

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ADDISON ON CONTRACTS.

VOL. I.

THE
LAW OF CONTRACT,
ETC.

BOOK I.

THE FORMATION AND INTERPRETATION OF CONTRACTS
IN GENERAL.

CHAPTER I.

THE FORMATION OF CONTRACTS.

SECTION I.

KINDS OF CONTRACTS (DIVISION OF CONTRACTS).

Definition of a Contract.¹— A contract is defined by Pothier to be “an agreement by which two parties mutually promise

¹ Terms so often used as “agreement” and “contract,” acquire different senses in different connections; to give a single definition of either which will embrace all recognized uses is perhaps impossible. A “contract,” as the word is most commonly used in modern American jurisprudence, means an exchange of promises, engagements, or values in consideration of each other; a meeting of minds in acceptance of a promise made for a consideration; or, it is the instrument or language embodying such exchange or meeting of minds. In the best use it does not embrace obligations which society imposes from reasons of general expediency, but only those which are founded on assent of parties real or supposed; and on the other hand, it does not extend to any mere moral obligation, unrecognized by law, which may be deduced from a promise unsupported by a consideration. Thus, though the expression is to be found in the books that “a judgment is a contract,” yet the better use of the word does not ordinarily include judgments. Again, for a time after our law discarded the view that marriage was a church sacrament, to say that it was “only a civil contract” was common; but later, this was found to involve inconvenient consequences. If it were only “

and engage, or one of them only promises and engages to the other, to give some particular thing, or to do or abstain from

civil contract, why might not parties dissolve it at pleasure? Hence the sounder and better view now generally held is that "contract" does not include marriage, which is a civil or social status, — an institution of society, — assumed, indeed, by contract of parties, but having obligations which are regulated by law, and which parties are powerless to release; so that although no special formalities may be necessary to attest the agreement by which it is formed, yet when formed, it is of higher obligations than those of contract. (See Bish. Mar. & D. ed. 1864, § 3, where earlier discussions how far marriage is a contract are collated; also *Starr v. Hamilton*, Deady, 268, 278; *Green v. State*, 58 Ala. 190; *Townsend v. Griffin*, 4 Harring. 440; *Maguire v. Maguire*, 7 Dana, 181; *Hugh v. Ottenheimer*, 6 Oreg. 231; *Dickerson v. Brown*, 49 Miss. 357; *Rundle v. Pegram*, ib. 751; *Dyer v. Brannock*, 2 Mo. App. 432; rev'd, 66 Mo. 391; *Hynes v. McDermott*, 82 N. Y. 41; and see *infra*. Yet many modern cases use the expression that marriage is a contract.) Again, obligations in which there is no apparent mutuality, such as a bond, are excluded in many instances where the word "contract" is used; mutuality is often said to be of the essence of a contract.

The shade of difference in meaning between "agree" or "agreement" on the one hand, and "to contract" or "a contract" on the other, as they are oftenest used, is, that in the first-mentioned words the implication of actual assent is stronger; that of a consideration is weaker. Those who would say that a judgment is a contract would hesitate to pronounce it an agreement; they would recognize that the latter word imports more of consent in fact than a debtor gives to a decision against him. Again, to say that a legislator *contracted* to vote for a bill would clearly impute bribery; it would imply that he promised his vote in exchange for some value given or promised. To say that he *agreed* to vote for it would not negative this, but would not imply it; the language would be satisfied by showing that he and his fellow-members had conferred about the bill, and had exchanged assurances that each would vote for it, but in the honest exercise of judgment. And, generally, "agreement" is the weaker, more vernacular word, "contract" the more technical and forcible. "Agreement" is more apt to be used of engagements formed by actual negotiation, but not embodied in the most solemn formalities of writing, seal, &c.; "contract," where the intention is to embrace the whole range of enforceable obligations created by mutual consent. "Bargain" seems like "contract" in importing consideration and full legal obligation; like "agreement" in implying actual negotiation and assent rather than definite legal formalities.

A definition of contract quite widely followed in this country is that which Blackstone quotes from some previous author (2 Bl. Com. 442): "An agreement upon sufficient consideration, to do or not to do a particular thing." Kent accepts this, limiting it to executory contracts. 2 Kent Com. 419. It is found, sometimes with slight modifications, in several of the decisions. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 572; *Sturges v. Crowninshield*, 4 Wheat. 122; *Robinson v. Magee*, 9 Cal. 81. Parsons adopts it in substance, except that he omits the element "upon sufficient consideration," saying: "We have not included the consideration in the definition of the contract, because we do not regard it as, of itself, an essential part thereof" (1 Pars. Contr. 7), and a few authorities seem to take the same view; but generally the consideration is treated as a necessary element.

A great number of special definitions are to be found in American decisions

doing some particular act." Every contract includes a concurrence of intention between two parties, one of whom promises

and text-books, many of which vary only trivially. The following selections present the leading, distinctive ideas :—

A deliberate engagement between competent parties, upon a legal consideration, to do, or to abstain from doing, some act. Story Contr. § 1.

A mutual promise, upon lawful consideration or cause, which binds the parties to performance. Webster.

A voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing. Robinson v. Magee, 9 Cal. 81.

A contract (*contractus*) is a drawing together of minds, until they meet. This agreement to do or not to do a particular thing is the contract. McNulty v. Prentice, 25 Barb. 204.

"Contract" ordinarily applies to agreements where both parties become obligated ; and not to notes and bills, where one party only is bound. Safford v. Wyckoff, 4 Hill, 442, 456.

It does not, like "deed," "bond," &c., necessarily import that there was a written instrument. Pearson v. Townsend, 2 Hill, 550.

It implies a deliberate engagement between competent parties to do or to abstain from doing some act. In its widest sense, the term includes records and specialties ; but it is usually employed to designate only simple or parol contracts. Pelham v. State, 30 Tex. 422.

"Contract" is obviously derived from *contrahere*, to draw together ; importing the same radical idea with "agreement," but with a stronger expression of mutuality in the use of the particle *con*. Mutuality, indeed, is of its very essence ; not only mutuality of assent, but mutuality of act also, — mutuality in the things agreed to be done by the contract. Thus mutual engagements, and no others, seem to come properly under the denomination of contracts. Burr. L. Dict., Contract.

The word "contract" is of comparatively recent use as a law term. Formerly, courts and lawyers spoke only of "obligations" (meaning thereby bonds, in which the word "oblige" is commonly used as one of the technical and formal terms), "covenants," and "agreements," — which last word was used as we now use the word "contract." The word "promise" is often used in instruments, and sometimes in legal proceedings. "Agreement" is seldom applied to specialties ; "contract" is generally confined to simple contracts ; and "promise" refers to the engagement of a party, without reference to the reasons or considerations for it or the duties of other parties. 1 Pars. Contr. 6.

The definitions given in the Indian Contract Act, 1872, are carefully drawn, as follows : When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal. When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise. The person making the proposal is called the "promisor," the person accepting the proposal is called the "promisee." Every promise, and every set of promises forming the consideration for each other, is an agreement. An agreement enforceable by law is a contract. Poll. Contr. 6.

Chitty says : In the language of our law the term "contract" comprises, in its full and more liberal signification, every description of agreement, obligation, or legal tie, whereby one party binds himself, or becomes bound, expressly or

something to the other, who on his part accepts such promise ; but it does not necessarily include a mutuality or reciprocity of

impliedly, to another, to pay a sum of money, or to do or omit to do a certain act ; but in its more familiar sense it is most frequently applied to agreements not under seal. The term "agreement," on the contrary, is rarely used amongst us, except in relation to contracts not under seal ; and this is evidently its proper use ; for, if considered in its strict and more critical meaning, it clearly imports a reciprocity of obligation ; and in that point of view it does not include specialties, which in general require no mutuality. 1 Chitty Contr. 2.

An aspect of the question, What is a contract ? peculiar to American law, arises under U. S. Const. art. 1, § 10, which declares that no State shall pass "any law impairing the obligation of contracts." The course of decision has been that the constitutional prohibition protects executed as well as executory contracts (*Fletcher v. Peck*, 6 Cranch, 137), and implied as well as express (*Fletcher v. Peck*, *ib.* 137 ; *Dartmouth College v. Woodward*, 4 Wheat. 657, 688 ; 1 Story, Const. § 1377), and that it embraces conveyances of land, grants, and charters in existence at the adoption of the Constitution, even those existing before the Revolution. *Fletcher v. Peck*, 6 Cranch, 137 ; *Terrett v. Taylor*, 9 Cranch, 43 ; *Dartmouth College v. Woodward*, 4 Wheat. 641, 651 ; *Green v. Biddle*, 8 Wheat. 1 ; *Canal Co. v. R. R. Co.*, 4 Gill & J. 1. But it is limited to agreements, dealings, or transactions which involve property or some object of value, and confer rights which may be asserted in a court of justice. *Dartmouth College v. Woodward*, 4 Wheat. 629 ; *Butler v. Pennsylvania*, 10 How. 402.

A compact between two States (*Green v. Biddle*, 8 Wheat. 1 ; *Allen v. McKean*, 1 Sumn. 276), or a compact of a State with Congress (*Lowry v. Francis*, 2 Yerg. 534), is a contract within the meaning of the prohibition ; so is a contract between a State and a corporation or individual (*Providence Bank v. Billings*, 4 Pet. 514 ; *Hall v. Wisconsin*, 103 U. S. 5 ; *Woodruff v. State*, 3 Ark. 285) ; and an ordinary statute of a State legislature, whenever it involves the constitutional elements of a contract or becomes part of one, will be deemed included. *Winter v. Jones*, 10 Ga. 190 ; *United States v. Great Falls Manuf. Co.*, 21 Md. 119 ; *Damman v. Commissioners of School Lands*, 4 Wis. 414 ; *McCracken v. Hayward*, 2 How. 608 ; *State Bank v. Knoop*, 16 How. 369 ; *Ohio, &c. Ins. Co. v. Debolt*, *ib.* 416 ; *Central Bridge Corp. v. Lowell*, 15 Gray, 106. Thus the clause restrains a State from passing laws that disturb rights of property already vested (*Benson v. New York*, 10 Barb. 223 ; *Wright v. Marsh*, 2 Greene, 94 ; *Davis v. O'Farrall*, 4 Greene, 168 ; *Oriental Bank v. Freeze*, 18 Me. 109 ; *Coffin v. Rich*, 45 Me. 507 ; *Southard v. Central R. R. Co.*, 26 N. J. L. 13 ; *Brooklyn, &c. R. R. Co. v. Brooklyn, &c. R. R. Co.*, 32 Barb. 358 ; *Houston v. Bogle*, 10 Ired. L. 496 ; *Gordon v. Inghram*, 1 Grant Cas. 152 ; *Herrick v. Randolph*, 13 Vt. 525) ; or restore a right by the repeal of a statute of limitations (*Knox v. Cleveland*, 13 Wis. 245 ; *Sprecker v. Wakely*, 11 Wis. 432 ; *Hill v. Kricke*, *ib.* 442 ; *Parish v. Eager*, 15 Wis. 532) ; or repeal an exemption from taxes previously granted upon a consideration or conditions which have been performed (*New Jersey v. Wilson*, 7 Cranch, 164 ; *Hardy v. Waltham*, 7 Pick. 110 ; *Atwater v. Woodbridge*, 6 Conn. 223 ; *Osborne v. Humphrey*, 7 Conn. 335 ; *Landon v. Litchfield*, 11 Conn. 251 ; *Gordon v. Appeal Tax Court*, 3 How. 133 ; *Pacific R. R. Co. v. Maguire*, 20 Wall. 36 ; *Home of the Friendless v. Rouse*, 8 Wall. 430 ; *Washington University v. Rouse*, *ib.* 439 ; *Northwestern University v. People*, 99 U. S. 309) ; or repeal an authority previously extended by the State to a municipal corporation to contract and to lay a tax for meeting the engagement, upon faith of which the corporation has

contract and liability. There must be two parties to every contract, a promisor or party making the promise, and a promisee

obtained credit. *People v. Bond*, 10 Cal. 563 ; *Von Hoffman v. Quincey*, 4 Wall. 535 ; *Wolf v. New Orleans*, 103 U. S. 353 ; *United States v. Jefferson County*, 7 Cent. L. J. 130 ; 6 Reporter, 486. A grant of land or executed gift of property by a State is within the provision (*Fletcher v. Peck*, 6 Cranch, 87 ; *Terrett v. Taylor*, 9 Cranch, 43 ; *Commercial v. Chambers*, 8 Sm. & M. 9 ; and so is an issue of transferable land-scrip under a State law. *McGee v. Mathis*, 4 Wall. 156. And in the case of a judicial sale of lands under a law naming a time for redemption, this term is a part of the contract, and cannot be changed to the prejudice of the buyer, by a subsequent State law. *Robinson v. Howe*, 13 Wis. 341 ; and see *Scobey v. Gibson*, 17 Ind. 572 ; *Iglehart v. Wolfin*, 20 Ind. 32 ; *Brouson v. Kinzie*, 1 How. 311 ; *McCracken v. Hayward*, 2 How. 612 ; *Gantly v. Ewing*, 3 How. 716 ; *Howard v. Bugbee*, 24 How. 464 ; *Bunn v. Gorgas*, 41 Pa. St. 441 ; *Weaver v. Maillot*, 15 La. Ann. 395 ; *Billmeyer v. Evans*, 40 Pa. St. 324.

Upon principles widely familiar, a charter of incorporation granted by a State legislature and duly accepted and acted on by corporators, forms a contract which the legislature may not afterwards impair unless by virtue of a right reserved. The leading case establishing this proposition is that of *Dartmouth College v. Woodward*, 4 Wheat. 594, in arguing which Daniel Webster (counsel for the College) gave the following graphic description of the elements of a contract under the Constitution : " There are in this case all the essential constituent parts of a contract. There is something to be contracted about ; there are parties, and there are plain terms in which the agreement is expressed. There are mutual considerations and inducements. The charter recites that the founder, on his part, has agreed to establish his seminary in New Hampshire, and to enlarge it beyond its original design, among other things for the benefit of that province ; and thereupon a charter is given to him and his associates designated by himself, promising and assuring to them, under the plighted faith of the state, the right of governing the College and administering its concerns in the manner provided in the charter. There is a complete and perfect grant to them of all the power of superintendence, visitation, and government. Is not this a contract ? If lands or money had been granted for the same purposes, the grant could not have been rescinded. Is there any difference between a grant of corporate franchises and a grant of tangible property ? No such difference is recognized in any decided case, nor does one exist in the common apprehension of mankind." The court sustained this general position, and declared the College charter a contract ; and although a plausible attempt to shake or limit the conclusion was made by the Supreme Court of Ohio, in *Bank of Toledo v. Toledo*, 1 Ohio St. 622, and other cases at about the same time, yet the doctrine was reasserted and even generalized and extended (the Ohio judgment being reversed) by the Supreme Court of the United States in *Piqua Branch v. Knoop*, 16 How. 369 ; *Dodge v. Woolsey*, 18 How. 331 ; and cases *Id.* 380, 384. Much space would be needed for expounding the decisions which have followed and applied the doctrine of the Dartmouth College case, and for tracing its application to different kinds of charters ; and to do so is the less necessary because during the half century since the principal decision, the legislatures have become accustomed to grant charters only subject to a general reserved power to alter or repeal them. There are, no doubt, a few corporations chartered before the date of the decision (1819), and some created since without reservation of such power, which are independent of legislative changes made without their assent ; but the great mass of private corporations now active are subject to a right reserved to the

or party to whom the promise is made ; but there may be only one contracting party. When there is a mutual contract bind-

legislature to make changes. Moreover, it is fully understood that the doctrine of the Dartmouth College case does not apply to the charters of public corporations created for the purposes of government. *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 538 ; *Dartmouth College v. Woodward*, 4 Wheat. 518, 694 ; *Police Jury v. Shreveport*, 5 La. Ann. 661 ; *Bradford v. Cary*, 5 Me. 339 ; *Marietta v. Fearing*, 4 Ohio, 429 ; *Governor v. Gridley*, Walk. (Miss.) 328 ; *People v. Morris*, 13 Wend. 325. A grant of franchises of government may at any time be resumed (*Trustees v. Tatman*, 13 Ill. 27 ; *People v. Pinckney*, 32 N. Y. 377, 393), and a power to alter and change public corporations, and to adapt them to the purposes intended, is implied in any enactment creating them. *State v. Baltimore, &c. R. R. Co.*, 3 How. 534, 552 ; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 536 ; *Amey v. Allegheny City*, 24 How. 364 ; *Bridgeport v. Hubbell*, 5 Conn. 237 ; *Bush v. Shipman*, 5 Ill. 186 ; *Gutzwiller v. People*, 14 Ill. 142 ; *Mills v. Williams*, 11 Ired. L. 558 ; *North Yarmouth v. Skillings*, 45 Me. 133 ; *Baltimore v. State*, 15 Md. 376 ; *Bristol v. New Chester*, 3 N. H. 524 ; *Paterson v. Society*, 24 N. J. L. 385 ; but see *St. Louis v. Russell*, 9 Mo. 507 ; *Trustees v. Aberdeen*, 13 Smeed & M. 645 ; *People v. Morris*, 13 Wend. 325. So transactions between the legislature and municipal corporations are deemed to partake of the nature of legislation rather than of compact. *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534 ; *Trustees v. Tatman*, 13 Ill. 27 ; *Reynolds v. Baldwin*, 1 La. Ann. 162 ; *Police Jury v. Shreveport*, 5 La. Ann. 661 ; *Layton v. New Orleans*, 12 La. Ann. 515.

To return to the construction placed on the word "contracts" in other applications of the constitutional prohibition : it has been held that a law is not necessarily void because it affects an appointment to a salaried office, for the relation between a government and its officers is not that of a contract (*Butler v. Pennsylvania*, 10 How. 402 ; *Commonwealth v. Mann*, 5 Watts & S. 418 ; *Commonwealth v. Bacon*, 6 Serg. & R. 322 ; *Barker v. Pittsburgh*, 4 Pa. St. 49 ; *Jones v. Shaw*, 15 Tex. 577) ; nor does the prohibition, as a general proposition, debar the States from exercising the superior right of eminent domain (*West River Bridge Co. v. Dix*, 6 How. 507 ; *Richmond R. R. Co. v. Louisa R. R. Co.*, 13 How. 71 ; *Rundle v. Delaware, &c. Canal Co.*, 14 How. 80 ; *State v. De Lesdernier*, 7 Tex. 99) ; or the right of regulating the jurisdiction or business of a court, even to the extent of delaying entry of judgment for a limited time (*Johnson v. Higgins*, 3 Mete. (Ky.) 566) ; of exempting property from execution (*Von Hoffman v. Quincey*, 4 Wall. 553) ; of regulating levy of execution, or the order in which several remedies shall be pursued (*Grosvenor v. Chesley*, 48 Me. 369 ; *Coriell v. Ham*, 4 Greene, 455 ; *Swift v. Fletcher*, 6 Minn. 550 ; *Beers v. Haughton*, 9 Pet. 359 ; *Mason v. Haile*, 12 Wheat. 373 ; *Sturges v. Crowninshield*, 4 Wheat. 200) ; or of altering laws allowing imprisonment for debt (*Beers v. Haughton*, 9 Pet. 359 ; *Mason v. Haile*, 12 Pet. 373 ; *Sturges v. Crowninshield*, 4 Wheat. 200 ; *Von Hoffman v. Quincey*, 4 Wall. 553) ; for these matters relate to the remedy rather than to the contract itself. Nor does it forbid a State to release its title to land because an agent claims an interest therein (*Mulligan v. Corbins*, 7 Wall. 487) ; or restrain from repealing a law permitting the State to be sued (*Beers v. State*, 20 How. 527 ; *Bank of Washington v. State*, ib. 530) ; or from repealing one providing for payment of the public debt (*Wilson v. Jenkins*, 72 N. C. 5 ; with which compare *Shaffer v. Jenkins*, ib. 275) ; or one conferring a military title and settling an annuity for life (*Dale v. Governor*, 3 Stew. 387) ; or from passing laws relating

ing each party to the other, the contract is bilateral. When the contract binds one person to another without any engagement being made by the latter, it is unilateral. Contracts, also, are either principal or accessorial. The first are those which are entered into by the parties on their own account as principals; the second are those which are entered into for

* assuring the performance of another principal con- [* 2] tract, such as guarantees or engagements of sureties.

Contracts, whether bilateral or unilateral, principal or accessorial, are made and authenticated either by parol, by deed, or by matter of record.¹

to internal police, (*Barlow v. Gregory*, 31 Conn. 261; *Coates v. New York*, 7 Cow. 585; *Vanderbilt v. Adams*, ib. 349; *Baker v. Boston*, 12 Pick. 184); or from retracting a mere license (*Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, ib. 659; *Stone v. Mississippi*, 101 U. S. 814); or laws vesting in married women a sole and separate estate in their property. *White v. White*, 5 Barb. 474. Nor does it affect a covenant by a corporation which would control its legislative authority and duties (*Presbyterian Church v. New York*, 5 Cow. 538); or protect inchoate rights depending for their original existence on the law itself (*Smith v. Packard*, 12 Wis. 371; *Robinson v. Howe*, 13 Wis. 341). Nor is the mere instrument of writing the contract: the *aggregatio mentium* is what is protected. *Erwin v. Bank of Kentucky*, 5 La. Ann. 4. But limits of space prevent pursuing these questions in further detail; our concern is only with the question, — What is a “contract,” within the sense of the constitutional clause?

Whether marriage is a contract within the prohibition, so that the States cannot enact marriage ceremonies or pass divorce laws, has been mooted; but the better opinion is, that the States may deal with it as an institution of society, a personal relation, subject to the local law. (See *ante*; also *Dartmouth College v. Woodward*, 4 Wheat. 629; *White v. White*, 5 Barb. 474; *Starr v. Hamilton*, Deady, 268, 278; *Townsend v. Griffin*, 4 Harr. (Del.) 440; *Maguire v. Maguire*, 7 Dana, 189; *State v. Kennedy*, 76 N. C. 251; *Story*, Conf. L. § 200.) Nearly the same question has arisen under the civil rights legislation of Congress, viz.: Does the enactment that all persons (*i. e.* negroes equally with whites) shall have the same right in every State and Territory to make and enforce contracts, &c., annul State laws forbidding marriages of whites and blacks? The argument has been that marriage is “only a civil contract,” hence that the national law embraces it. The courts have thus far answered this by saying that the civil rights law, in speaking of the right to make contracts, means only that the colored race may make any contract valid by the law of the State where it is made, but that marriage is not a contract in this sense. *Ex parte Kinney*, 3 Hugh. 1; *Green v. State*, 58 Ala. 190; *Fraser v. State*, 3 Tex. App. 263; *François v. State*, 9 Tex. App. 144; see also *Ellis v. State*, 42 Ala. 525; *Ford v. State*, 53 Ala. 150; and to the contrary, *Burns v. State*, 48 Ala. 195. See 21 Am. Dec. 742 and note; 34 ib. 165.

¹ Divisions of contracts as often mentioned in American jurisprudence as either of the classes explained in the text, are into express and implied; into executory and executed; into real, personal, and mixed; and into private or individual, corporate, and public. The distinction between express and implied contracts may well be indicated by saying that the former are actual, the latter

Parol or Simple Contracts are contracts which are either made by word of mouth, or are inferred from the silent language of

constructive, imputed by law rather because justice requires treating parties as if under contract, than because of any real supposition that they have contracted. For various purposes it is convenient to distinguish various kinds of express contracts : thus, there are *statutory* contracts, as when an act of legislation contains a proposal which is accepted by individuals ; contracts by *record*, or such as are judicially authenticated, of which a recognizance is a good example ; *specialties*, or sealed contracts, which class includes all attested by a party's seal ; *written* or *simple-written* contracts, which are such as are reduced to writing but do not bear seal ; and lastly *oral* contracts, or those framed only by word of mouth. But classifications of this kind vary somewhat in different books. "Specialty" is sometimes used as including contracts of record. Simple-written and oral contracts are often treated as forming one class only, called *parol* or simple contracts ; for the distinction between the two is not ancient or radical, but arises from rules of statute (the statute of frauds, &c.) requiring some contracts to be reduced to writing ; or of evidence, such as that forbidding a memorandum of agreement to be varied by proof of the oral negotiations leading to it. Indeed, for the most important practical purposes the division may be into *sealed* (or special) and *simple* (or parol) contracts ; ignoring any distinction between unsealed written and oral agreements. *Perrine v. Cheeseman*, 6 Halst. L. 174, 19 Am. Dec. 388 ; *Whitehill v. Wilson*, 3 Penr. & W. 405 ; 24 Am. Dec. 326 ; *Quigley v. Muse*, 15 La. Ann. 197 ; *Stabler v. Cowman*, 7 Gill & J. 284 ; 7 Pars. Contr. 7 ; 1 Chitty Contr. 2. The employment of "verbal" in the sense of "oral" or "parol" in connection with "contract," though very common, is etymologically erroneous ; for "verbal" means embodied in words, but they may be either spoken or written, hence it is substantially coextensive with "express."

Until a promise has been performed it is termed "executory ;" after performance, "executed." Obviously, one of two mutual promises may have become executed while the other yet remains executory ; as where seller pays price, but buyer promises delivery in future. So, one or more of several connected promises of one party may be executed while his other engagements remain executory. What is usually meant by speaking of a contract as executory or executed is not that it is so as an entirety, but that the promise particularly under discussion is so. Thus, to speak of a sale for cash, of goods to be delivered in future, as an executory contract would be natural if the seller's obligation to deliver were the matter chiefly in question ; but if the controversy related to the buyer's payment the contract would be called executed. And "executed" is (although "executory" is not) applied to contracts in a sense relating to the completion of the written instruments in which they are embodied, and not to performance of their substance. In this sense "to execute" means to complete the paper as an effective instrument ; to sign it, and to seal and deliver it whenever these formalities are essential to its inception. Thus, "executed," when spoken of promissory notes, imports delivery as well as making. *Bagley v. McMickle*, 9 Cal. 430. And "execution," when used in a legal sense, with reference to a bond, implies signing, sealing, and delivery. *Tiernan v. Fenimore*, 17 Ohio, 545.

In common-law use the adjectives "real," "personal," and "mixed" (which in the civil law have a more technical meaning : see these words in Abb. L. Dict.) are applied, according as the contract deals with land, or personalty, or both.

The contracts of individuals or natural persons are called "private ;" those to which a government, State, or nation is a party are called "public ;" more par-

men's conduct and actions, or are put into writing and signed by the parties to them, but are not sealed and delivered. Such contracts cannot be enforced unless they are founded upon some good or valuable consideration. Thus, in order to maintain an action for the breach of a promise or undertaking not under seal, the party making the promise must have acquired some right or received some benefit, or the party accepting such promise must have suffered some loss, or sustained some injury or inconvenience, in consequence of the making and acceptance of the promise. This rule has been wisely established by the law for the purpose of protecting weak and thoughtless persons from the consequences of rash, improvident, and inconsiderate engagements. (a)¹

The Consideration. Absence of Consideration.² — When, at the desire of the promisor, the promisee, or any other person,

ticularly, however, when the obligation of the government is the matter under discussion. In like manner, the engagements of corporations are styled "corporate contracts;" or the kind of corporation is indicated, as in the phrase "city contracts," and the like.

² The general doctrine that simple contracts need a consideration to render them enforceable has always been recognized in this country. Sealed instruments may be sustained on the ground of solemnity of execution, or that the seal imports a consideration (*Rutherford v. Executive Committee*, 9 Ga. 54; *Patton v. Ashley*, 8 Ark. 290; *Wing v. Chase*, 35 Me. 260; *Brewer v. Bessinger*, 25 Miss. 86; *Morrow v. Smith*, 10 Mo. 303; *Schuylkill Navigation Co. v. Harris*, 5 Watts & S. 28; yet where a parol agreement is framed for the purpose of reforming a sealed instrument, a consideration for the parol agreement will not be implied from the seal of the specialty, *Sharpe v. Rogers*, 12 Minn. 174); but a simple contract must have a consideration in fact. Decisions recognizing this principle have been very numerous, both at law and in equity. *Doebler v. Waters*, 30 Ga. 344; *Lowe v. Bryant*, 32 Ga. 235; *Bailey v. Walker*, 29 Mo. 407; *Thorne v. Deas*, 4 Johns. 84; *Allen v. Allen*, 40 N. J. L. 416; *Washington, &c. Bank v. Farmers' Bank*, 4 Johns. Ch. 62; *Littlejohn v. Patillo*, 2 Hawks, 302; *Coggeshall v. Coggeshall*, 1 Strobb. 43.

And (except that when negotiation of commercial paper carries it to a new holder for value, he is not obliged to show its consideration) no difference is recognized between simple-written, oral, and implied contracts; a consideration is necessary to either. *Brown v. Adams*, 1 Stew. (Ala.) 51; *Cook v. Bradley*, 7 Conn. 57; *Beverleys v. Holmes*, 4 Munf. 95; *People v. Shall*, 9 Cow. 778; *Burnet v.*

(a) "Tantum meminimus distinguendas esse promissiones serias, meditata et utiles ab inconsideratis, temerariis atque inutilibus, cum quis non dispositive, ut loquuntur, nec serio, sed vel narrative, vel per jocum, et aliud

agens, aliquid pronuntiat, ut ex illis tantum, non ex his, obligatio et actio oriuntur." — *Vinnius*, p. 661. *Eastwood v. Kenyon*, 11 Ad. & E. 450, 451; *Story on Bailments*, 120, 121.

¹ See Appendix, Vol. III.

has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act

Bisco, 4 Johns. 235 ; *Clark v. Small*, 6 Yerg. 418 ; *Roper v. Stone*, Cooke, 497 ; *Perrine v. Cheeseman*, 11 N. J. L. 174 ; *Mosby v. Leeds*, 3 Call, 439.

It has, however, been well remarked that there is a distinction between the motive for entering into a contract and the consideration of the contract. Nothing is a consideration which the parties do not regard as such. An expectation of certain results may be the motive, yet neither the expectation nor the result enters into the consideration. *Philpot v. Grunninger*, 14 Wall. 510. For general discussions of the necessity, nature, and adequacy of considerations, see 1 Pars. Contr. 427-474 ; Poll. Contr. 117-165.

By well-settled rules, a consideration may be either some advantage or benefit reserved to the promisor, or some loss, trouble, or disadvantage assumed by the promisee. *Tompkins v. Philips*, 12 Ga. 52 ; *Molyneux v. Collier*, 17 Ga. 46 ; *Doyle v. Knapp*, 4 Ill. 334 ; *Buchanan v. International Bank*, 78 Ill. 500 ; *Watt v. Rice*, 1 La. Ann. 280 ; *Camfraney v. Pilie*, Ib. 197 ; *Warren v. Whitney*, 24 Me. 561 ; *Hartzell v. Saunders*, 49 Mo. 433 ; *Conover v. Stillwell*, 34 N. J. L. 54 ; *White v. Baxter*, 71 N. Y. 254. Advantage or benefit to the promisor need not be of certain, definite nature, or of large importance or value ; the gratification of a wish, if lawful, a contingent benefit, prevention of a probable loss, discharge of a debt or obligation in behalf of the promisor, may be sufficient (*Bell v. Greenwood*, 21 Ark. 219 ; *Barringer v. Warden*, 12 Cal. 311 ; *Seymour v. Harvey*, 8 Conn. 63 ; *Newhall v. Paige*, 10 Gray, 366 ; *Cantey v. Duren*, Harp. 434 ; *Odineal v. Barry*, 24 Miss. 9 ; *Harlan v. Harlan*, 20 Pa. St. 303) ; or a very slight advantage to one party, or a trifling inconvenience to the other, if promisor is a man of good capacity, who is not at the time under the influence of any fraud, imposition, or mistake (*Harlan v. Harlan*, 20 Pa. St. 303) ; or where relationship of parties suggests natural affection in aid of the nominal money consideration paid (*Haines v. Haines*, 6 Md. 435). Even delivery of notes to an agent has been held sufficient consideration to sustain his engagement to endeavor to collect them ; no payment for his services having been stipulated. *Robinson v. Threadgill*, 13 Ired. L. 39. The division of a debt and acceptance of notes payable at different times creates a valid obligation on the part of the creditor not to sue on the original claim before a default in the payment of one of the notes. *Mouton v. Noble*, 1 La. Ann. 192.

A promise to indemnify the promisee against any loss he may incur in resisting a demand of the third person which the promisor claims is unlawful, is for good consideration, and may be enforced, if the resistance will entail serious risk or loss on the promisee. *White v. Baxter*, 71 N. Y. 254. The law does not require that a benefit should accrue to the person making the promise ; if something valuable flows from the person to whom it is made, or he suffers some prejudice or inconvenience, or incurs an expense or charge, and the promise is the inducement to his doing so, this is sufficient. *Violett v. Patton*, 5 Cranch, 142, 150 ; *Townley v. Sumrell*, 2 Pet. 170, 182 ; *Clark v. Sigourney*, 17 Conn. 511 ; *Glasgow v. Hobbs*, 32 Ind. 440 ; *Lemester v. Burckhart*, 2 Bibb, 30 ; *Overstreet v. Philips*, 1 Litt. (Ky.) 120 ; *Wooldridge v. Cates*, 2 J. J. Marsh. 222 ; *Hilton v. Southwick*, 17 Me. 303 ; *Lent v. Padelford*, 10 Mass. 230 ; *Train v. Gold*, 5 Pick. 380 ; *Pitt v. Gentle*, 49 Mo. 74 ; *Carr v. Card*, 34 Mo. 513 ; *Farmer v. Stewart*, 2 N. H. 97 ; *Underhill v. Gibson*, Id. 352 ; *Miller v. Drake*, 1 Cal. 45 ; *Powell v. Brown*, 3 Johns. 100 ; *White v. Baxter*, 71 N. Y. 254 ; *Chailleux v. Hall*, 1 E. D. Smith, 5 ; *Seaman v. Seaman*, 12 Wend. 381 ; *Brown v. Ray*, 10 Ired. L. 72 ; *Watkins v.*

or abstinence or promise is called a consideration for the promise. (b) Gratuitous promises and undertakings, not clothed

James, 5 Jones L. 105 ; *Randle v. Harris*, 6 Yerg. 508 ; *Dorwin v. Smith*, 35 Vt. 69 ; *Mosely v. Boush*, 4 Rand. 392. Examples of cases in which agreements have been sustained on the ground that the promisee suffered somewhat, and irrespective of whether the promisor gained aught, are : where promisee has released a demand, satisfied a judgment, or the like, which he held against a third person (*Kenan v. Holloway*, 16 Ala. 53 ; *Taylor v. Meek*, 4 Blackf. 388) ; or where he does something for the benefit of a third person, at promisor's request (*Violet v. Patton*, 5 Cranch, 146 ; *Wiggins v. Keiye*, 6 Ind. 252 ; *Watt v. Rice*, 1 La. Ann. 280) ; or where he makes successful efforts to procure a certain house, post-office, railroad station, or other public improvement to be erected in some locality particularly desired by the promisor. *Bryan v. Dyer*, 28 Ill. 188 ; *Kennedy v. Cotton*, 28 Barb. 59.

It has been held a good consideration for an agreement to pay a teacher increased compensation, that he consented to hold his place at the will of trustees, instead of holding it as before, from year to year, upon the ground that such change in the tenure of his situation was a detriment to himself, as well as, under the circumstances, a benefit to the trust. *Hildreth v. Pinkerton Academy*, 29 N. H. 227. And generally a waiver of a legal right at request of promisor is a sufficient consideration for his promise given to induce it. *Sykes v. Lafferry*, 27 Ark. 407 ; *Sanford v. Huxford*, 32 Mich. 313.

Mutual or reciprocal promises have often been held to form each a sufficient consideration for the other, irrespective of any apparent equality of value. (Consult *Thomason v. Dill*, 30 Ala. 444 ; *Abrams v. Suttles*, Busb. L. 99 ; *Seward v. Mitchell*, 1 Coldw. 87 ; *Young v. Snyder*, 3 Grant Cas. 151 ; *White v. Demilt*, 2 Hall, 405 ; *Funk v. Hough*, 29 Ill. 145 ; *Downey v. Hinchman*, 25 Ind. 453 ; *Leach v. Keach*, 7 Iowa, 232 ; *Whitehead v. Potter*, 4 Ired. L. 257 ; *Briggs v. Tillotson*, 8 Johns. 304 ; *Forney v. Shipp*, 4 Jones L. 527 ; *Babcock v. Wilson*, 17 Me. 372 ; *Appleton v. Chase*, 19 Me. 74 ; *Nunnally v. White*, 3 Metc. (Ky.) 584 ; *Byrd v. Fox*, 8 Md. 574 ; *Congregational Society v. Perry*, 6 N. H. 164 ; *George v. Harris*, 4 N. H. 533 ; *Coleman v. Eyre*, 45 N. Y. 38 ; *Briggs v. Sizer*, 30 N. Y. 647 ; *Commissioners v. Perry*, 5 Ohio, 58 ; *Nott v. Johnson*, 7 Ohio St. 270.) They must, however, be substantially simultaneous, —made in view of each other. *Livingston v. Rogers*, 1 Cai. 583 ; *Keep v. Goodrich*, 12 Johns. 397 ; *Tucker v. Woods*, Id. 190 ; *James v. Fulero*, 5 Tex. 512. But it is not strictly essential that mutuality of obligation should exist between the parties at the very time when the promise in question was made. *Marie v. Garrison*, 83 N. Y. 14.

If one promises another to pay the latter a sum of money if he will do a particular act, and the latter does the act before the revocation of the promise, the promise becomes binding, even though the promisee did not, at the time when the offer was made, engage to do the act ; for the previous promise amounts to a request to do the act, and performance of the act is an acceptance. *Barnes v. Perine*, 9 Barb. 202.

Promises to pay a pre-existing debt of another person are within the rule, and require some consideration, moving from the creditor to the sponsor or surety. *Beall v. Ridgeway*, 18 Ala. 117 ; *Comstock v. Breed*, 12 Cal. 286 ; *Cutler v.*

(b) This is the definition of "consideration" given in the Indian Contract Act of 1872.

with the formalities prescribed by the civil law to render them legally binding, were termed by the civilians *nuda pacta*, or

Everett, 33 Me. 201 ; Aldridge v. Turner, 1 Gill & J. 427 ; Tenney v. Prince, 4 Pick. 387 ; Chaffee v. Thomas, 7 Cow. 358 ; Bailey v. Freeman, 4 Johns. 280 ; Leonard v. Vredenburg, 8 Id. 29 ; Chavin v. Labarge, 1 Mo. 556 ; Pfeiffer v. Kingsland, 25 Mo. 66 ; Reading R. R. Co. v. Johnson, 7 Watts & S. 317 ; Cobb v. Page, 17 Pa. St. 469 ; Gilman v. Kibler, 5 Humph. 19 ; Whelan v. Edwards, 29 Ga. 315 ; Richardson v. Williams, 49 Me. 558 ; Parker v. Carter, 4 Munf. 273 ; Chandler v. Hill, 2 Hen. & M. 124 ; Barlow v. Smith, 4 Vt. 139. And so of promises to answer for another's default (Ellison v. Jackson Water Co., 12 Cal. 542 ; Hawley v. Farrar, 1 Vt. 420) ; or to perform an engagement of another in his place (Smith v. Mudgett, 20 N. H. 527) ; thus the lack of an independent consideration has been held to avoid a promise by a master to pay stolen money received by his slave, which has not come to his own hands (Jelks v. McRae, 25 Ala. 440) ; a guaranty or indorsement in blank of a note (Aldridge v. Turner, 1 Gill & J. 427 ; Tenney v. Prince, 4 Pick. 385 ; 7 Pick. 243) ; a promise by A to pay the debt of B, when he should be in possession of funds belonging to B. (Pope v. Fort, 2 McMull. 60) ; a promise by a debtor to pay his debt to a third person, except where the creditor has released the debtor, or assigned the debt to such third person (Phalan v. Stiles, 11 Vt. 82) ; a promise to pay the debt of another, at the end of one year, leaving the debt to be enforced in the interval against the debtor (Russell v. Buck, 11 Vt. 166) ; a promise by a son to pay the debt of his father (Parker v. Carter, 4 Munf. 273).

Subscription-papers have given rise to a number of decisions on the question of consideration. The early view, of course, was that a simple promise to give money in the future is not enforceable, but is a nude pact, and must be treated as a mere declaration of intention. The fact that the purpose is charitable or advantageous to the public, or that the promise was reduced to writing, or even that the writing stipulates that a specified sum shall be subscribed before any are bound, and this sum is reached, does not sustain it. Bridgewater Academy v. Gilbert, 2 Pick. 579 ; Methodist Orphans' Home Association v. Sharp, 6 Mo. App. 150 ; Hamilton College v. Stewart, 1 N. Y. 581 ; Stuart v. Valley R. R. Co., 32 Gratt. 146. But many exceptions or qualifications are recognized. If several persons unite in signing successively the same paper, or promising donations for the same object, a case of mutual promises is presented, each subscription is deemed to have been made in consideration of the others, and all are thus sustainable. Pryor v. Cain, 25 Ill. 292 ; Donald v. Gray, 11 Iowa, 508 ; Watkins v. Eames, 9 Cush. 537 ; Underwood v. Waldron, 12 Mich. 73 ; Trustees v. Stetson, 5 Pick. 506 ; Amherst Academy v. Cows, 6 Pick. 427 ; Constock v. Howd, 15 Mich. 237 ; George v. Harris, 4 N. H. 533 ; Society v. Perry, 6 N. H. 164 ; Baptist Society v. Robinson, 21 N. Y. 234 ; State Treasurer v. Cross, 9 Vt. 289 ; Troy Academy v. Nelson, 24 Vt. 189 ; Eyleshimmer v. Van Antwerp, 13 Wis. 546. Again, if conditions are expressed in a subscription-paper, and these are performed, the performance may furnish a consideration for the subscriber's promise. Norton v. Janvier, 5 Harr. (Del.) 346 ; Parsonage Fund v. Ripley, 6 Me. 412 ; Williams College v. Danforth, 12 Pick. 541 ; State Treasurer v. Cross, 9 Vt. 289. Even where the subscription-paper did not contain any condition or consideration, but the declaration on it and the evidence showed that the consideration was the agreement of the plaintiffs to remove an old church and build a new one, and that they had done both, the plaintiffs were held entitled to recover. Barnes v. Perine, 15 Barb. 249. And quite generally, where advances have been made or

naked engagements, and did not induce any legal rights; for it was thought better, we are told, to let such contracts rest upon the mere integrity and good faith of the parties who made them, than to subject them to the compulsory authority of the law. (c) Bracton, who wrote in the time of Hen. III. is the first of our lawyers who treats of naked promises and promises clothed with a consideration, and advocates, in the language of the civilians, the well-known principle, *ex nudo pacto non oritur actio*. (d) In "Doctor and Student" it is observed, "A nude or naked promise is where a man promiseth another to give him certain money such a day, or to build a house, or to do * him such [* 3] certain service, and nothing is assigned for the money, for the building, or for the service. These be called naked promises, because there is nothing assigned why they should be made; and I think no action lieth in those cases, though they be not performed. . . . Also, if I promise to another to keep him such certain goods safely to such a time, and after I refuse to take them, there lieth no action against me for it; for if the promise be so naked that there is no manner of consideration why it should be made, then is a man not bound to perform it; for it is to suppose that there was some error in the making of the promise." (e) But if a man is entrusted with and receives

expenses or liabilities incurred by other persons, in fair and reasonable reliance on voluntary subscriptions and before notice of the subscriber's withdrawal, this will be deemed sufficient to make the subscriptions obligatory. *Gittings v. Mayhew*, 6 Md. 113; *Homes v. Dana*, 12 Mass. 190; *Farmington Academy v. Allen*, 14 Mass. 172; *Underwood v. Waldron*, 12 Mich. 73; *Ohio Wesleyan Female College v. Love*, 16 Ohio St. 20; *Hopkins v. Upshur*, 20 Tex. 89; *Doyle v. Glasscock*, 24 Tex. 200. But see *Church v. Kendall*, 16 Am. L. Reg. N. S. 546 and note, ib. 548. A subscriber is bound by his subscription, if the purpose is lawful, and the duty of receiving the money subscribed has been assumed by a party duly designated; or, in case none is designated, if expense has been incurred in fair reliance upon the subscription. *Underwood v. Waldron*, 12 Mich. 73. Moreover, it is not difficult so to frame a subscription-paper that the efforts and labors of the promoters in procuring subscriptions and otherwise advancing the public object desired, shall appear as a consideration of each subscription. And Parsons thinks (1 Pars. Contr. 454) that a seal opposite each name, or even one seal with a declaration in the heading that each subscriber adopts it as his, may take the place of a consideration, and render the subscriptions enforceable.

(c) Vin. Com. de Institut. 658, 659,
ed. 1755. Plowd. 309 a.

(e) Doct. & Stud. Dial. 2, chap. 24;
Shep. Touch. 224, 225; *Else v. Gat-*

(d) Bracton, lib. 3, cap. 1, fol. 99,
ed. 1569.

ward, 5 T. R. 143, 148.

money or goods on the faith of a promise to deal with them in a particular manner, an action can be maintained against him for any loss or injury that may be sustained by reason of a breach of the promise, although the duty or trust may have been undertaken gratuitously.

Thus a promise to give any particular thing, such as a horse, or a colt, or a watch, to another, unaccompanied by an actual or constructive transfer or change of possession, is a mere *nudum pactum*, and cannot be enforced by compulsion of law. (*f*) A promise by one man to pay a debt already incurred by another is a *nudum pactum*; and so also is a promise by a creditor to accept less than the full amount of an admitted debt, or to give time for the payment thereof; (*g*) also a promise to pay money to a person not entitled to receive it; (*h*) a promise by the heir to pay the bond of his ancestor, when the heir is not bound by the bond; a promise by a widow to pay her husband's debts, or to pay a note given by her when under coverture. (*i*) And, where a specific sum is fixed as the price of goods sold and delivered, or as an agreed remuneration for work and services, a subsequent promise, without any new consideration, to pay an additional sum for the same work or the same services is a *nudum pactum*. (*k*) Where, however, a man makes a representation on the faith of which another man alters his position, the man making the representation is bound to perform it, for in the eye of a court of equity it is a contract. (*l*)

[* 4] * A promise or agreement to make a duty of a limited

(*f*) *Donaldson v. Donaldson*, Kay, 718; *Milroy v. Lord*, 31 L. J. Ch. 798. By the civil law gifts were required to be publicly registered. Cod. lib. 8, tit. 54; Dig. lib. 42, tit. 8.

(*g*) *Fitch v. Sutton*, 5 East, 232; *Pinnell's Case*, 5 Co. 117 *a*, 117 *b*; *Cooper v. Phillips*, 1 C. M. & R. 649.

(*h*) *Clay v. Willis*, 1 B. & C. 364.

(*i*) *Barber v. Fox*, 2 Saund. 135, 137 *h*; 1 Vent. 159; *Lloyd v. Lee*, 1 Str. 94; *Goodwin v. Willoughby*, Latch, 142; *Fabian v. Plant*, 1 Show. 178. But as a promissory note given by a married woman as a security for advances made to her husband binds her

separate estate, such a note is a good consideration for another note given by her after her husband's death for a balance then due, although the former note is barred by the statute of limitations. *La Touche v. La Touche*, 3 H. & C. 576; 34 L. J. Exch. 85.

(*k*) *Harris v. Watson*, Peake, R. 102; *Brown v. Crump*, 1 Marsh. 567; *Newman v. Walters*, 3 B. & P. 612.

(*l*) *Per Bacon, V. C.*, in *Dashwood v. Jernyn*, 12 Ch. D. 781, citing *Hammersley v. De Biel*, 12 Cl. & F. 45, 61 *n.*, and other cases, and see *post*, p. * 207, *Estoppels in pais*; and *post*, p. * 1133.

nature more extensive, and to undertake a greater liability than is imposed by law upon the party making the promise, is a *nudum pactum*, unless there be some fresh consideration. The promise of an executor or administrator, for example, to pay the debt of his testator or intestate, (*m*) does, in no degree, alter or extend his liability. The executor does not, by such a promise, render himself personally liable, but is only chargeable to the amount of his assets.

Valuable Consideration.¹—Neither “love and affection,” nor “blood relationship,” (*n*) nor “friendship,” constitute a sufficient cause or consideration for the fulfilment by coercion of law of an undertaking or promise not under seal. (*o*)

The performance of an act which the party is under a legal obligation to perform cannot constitute a good consideration for a promise. “If,” for example, “a debtor, being bound by law to give up the title-deeds of an estate to a purchaser, pursuant to a decree of sale, enters into an agreement with the purchaser to deliver them to him on payment of a sum of money, the debtor is not only without any right of action for enforcing such an agreement, but if the money is paid, he is himself subject to an action for the recovery of it back.” (*p*) So, if a debt is released or discharged, the giving up of a deed or collateral security orig-

¹ Some American cases sustain the position of the text, that natural affection may sustain an executed conveyance or gift, but not an executory promise. Consult *Kirkpatrick v. Taylor*, 43 Ill. 207; *Ford v. Ellingwood*, 3 Met. (Ky.) 359; *Pennington v. Gittings*, 2 Gill & J. 208; *Duvoll v. Wilson*, 9 Barb. 487; *Hayes v. Kershow*, 1 Sandf. Ch. 258; *Priester v. Priester*, Rich. Eq. Cas. 26; *West v. Cowins*, 74 Ind. 265. That marriage is not only a good but even a valuable consideration for a promise given to induce the marriage, or on the faith of which it is contracted, see *Anderson v. Green*, 7 J. J. Marsh. 448; *Waters v. Howard*, 8 Gill, 262; *Whelan v. Whelan*, 3 Cow. 537; *Wood v. Jackson*, 8 Wend. 9; *Gurvin v. Cromartie*, 11 Ired. L. 174; *Chichester v. Vass*, 1 Munf. 98. Marriage is a valuable consideration, and a married woman is regarded as a purchaser for value of all property which accrues to her by virtue of the marriage or of an antenuptial agreement. *Derry v. Derry*, 74 Ind. 560; *Magniac v. Thompson*, 7 Pet. 348; 4 Kent Com. 463, and cases there cited.

(*m*) *Pearsan v. Henry*, 5 T. R. 6; *Rann v. Hughes*, 7 T. R. 350, n.; *Mitchinson v. Hewson*, ib. 348.

(*n*) *Tweddle v. Atkinson*, 1 B. & S. 393.

(*o*) *Harford v. Gardner*, 2 Leon. 30; *Holliday v. Atkinson*, 5 B. & C. 501; 8 D. & R. 163; *Cluff v. Moore*, 1 Sid. 413; *Lampleigh v. Braithwaite*, Hob. 105.

(*p*) *Pothier*, by *Evans*, p. 25.

inally deposited with the creditor to secure the payment of the debt cannot form a good consideration for a promise ; for, by the release of the debt, the security is released, and the creditor is no longer justified in retaining it. (*g*) But the performance of an act a person has agreed with another to perform is a good consideration to support a promise by a third person, if the latter derives a benefit from the performance. (*r*)²

A promise to pay money to a sheriff in consideration of his executing a writ is also a *nudum pactum* ; and so, also, is a promise to pay money to a witness regularly subpoenaed to give evidence at a trial, as a compensation for his loss of time ; because, in each of these cases, the parties are bound by law to do the acts in question, without compensation or reward. (*s*) It has been held, also, that a promise to pay money to the crew [* 5] of a vessel, as an * incitement to exertion during a storm, is a *nudum pactum*, and cannot be enforced, because the sailor is bound to do his utmost to save and preserve the vessel ; (*t*) but if any extraordinary and additional services have been rendered beyond what the parties were in strictness bound to perform, there is a sufficient foundation for the promise, and the law will enforce its faithful performance. (*u*) If, therefore, a vessel is so short-handed as to render it dangerous to life to proceed to sea, and the crew are not bound under their articles to sail with so small a complement of seamen, a promise of additional remuneration in consideration of the increased risk is valid and binding. (*x*) A promise not to abuse the process of the law, as, for instance, to conduct proceedings in bankruptcy so as to avoid, as far as possible, injury to the debtor's credit, will form no consideration for a promise by the debtor. (*y*)

(*g*) *Cowper v. Green*, 7 M. & W. 641.

(*r*) *Scotson v. Pegg*, 6 H. & N. 295 ; 30 L. J. Exch. 225.

(*s*) *Bridge v. Cage*, Cro. Jac. 103 ; *Willis v. Peckham*, 4 Moore, 300 ; *Collins v. Godefroy*, 1 B. & Ad. 956 ; *Dixon v. Adams*, Cro. Eliz. 538 ; *Jackson v. Cobbin*, 8 M. & W. 797 ; *Nokes v. Gibbon*, 26 L. J. Ch. 208.

(*t*) *Harris v. Watson*, Peake, 102 ; *Stilk v. Myrick*, 2 Campb. 317 ; 6 Esp. 129 ; *Newman v. Walters*, 3 B. & P. 615.

(*u*) *England v. Davidson*, 11 Ad. & E. 856.

(*x*) *Hartley v. Ponsonby*, 7 Ell. & Bl. 872 ; 26 L. J. Q. B. 322.

(*y*) *Bracewell v. Williams*, L. R. 2 C. P. 196.

Fraudulent Consideration.¹ — Corrupt or fraudulent considerations will not support a promise. Thus, where the defendants, in consideration of the plaintiff promising to obtain a contract from a company in relation to which he was in a position of trust, contracted to pay him a commission, it was held that he could not recover, for although the jury found that he had not been induced by such consideration to act corruptly, yet such consideration was in itself corrupt. (z) So, also, as we shall see, (a) illegal and immoral contracts, and such as are against public policy, cannot be enforced, and this is sometimes because the consideration for the promise is bad, and sometimes, although the consideration is good, yet the promise is bad.³

Sufficient Considerations² — **Works and Services.** — By the civil law, if any one agreed to perform or effect anything on the understanding that another in his turn should do something, or give or deliver something, the person in whose favor the thing had been so delivered or done was not permitted to be deficient in performing what was stipulated on his part, but was compelled to performance, so that, if there was a cause or consideration *facti vel traditionis*, a corresponding obligation or duty arose. So, by the common law, if anything is performed or done which the party is under no legal obligation to perform or do at the request of the promisor, as the consideration or inducement for the promise whereby the promisor or party *making the promise has expected to obtain or [* 6] secure for himself some benefit or advantage, or whereby the promisee, or party to whom the promise has been made, has been expected to sustain some trouble or loss, or suffer some injury or inconvenience, there is a sufficient consideration to render the promise obligatory in law, and capable of sustaining an action. Thus, the mere surrender and delivery of a letter or

¹ Fraud in the consideration is usually urged as reason for avoiding a contract, or in defence of some action founded on it. Hence the topic of fraudulent consideration is chiefly discussed in chapter ii. of Book V. *post*, § 2, p. *1173.

² The general subject of sufficiency is treated more fully at page *12, *post*, under the heading, "Adequacy of Consideration," where American cases are mentioned.

(z) *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549.

(a) *Post*, p. *1135.

³ See Appendix, Vol. III.

other written document which the promisee has a right to keep and retain in his possession is a sufficient consideration for the promise, although the possession of it may turn out eventually to be of no value in a pecuniary point of view, or no benefit may have resulted to the one party, nor prejudice to the other, from the surrender and delivery of the document. (b) If one person agrees to transfer, and another person agrees to accept, shares in a public company, upon which shares nothing has been paid, and which have no marketable value at the time of the transfer, the agreement constitutes a binding contract. (c) If the defendant has promised the plaintiff to pay him a sum of money in consideration of the plaintiff's procuring a tenant for the defendant, or getting him a sale or purchase and conveyance of a particular estate, there is a good and valid consideration for the promise. (d)

A Consideration of Loss or Inconvenience,¹ sustained by one party at the request of another, is as good a consideration in law for a promise by such other as a consideration of profit or convenience to himself. It is sufficient, if there be any damage or detriment to the plaintiff, though no actual benefit accrue to the party undertaking. (e) If the plaintiff has become security for the promisor, or has accepted bills, or imposed upon himself any legal liability at the request of the latter, there is a sufficient consideration to support a promise and render it binding in law, although no actual benefit or advantage has resulted to the promisor. (f) Any trouble or labor, too, however slight, undertaken by the plaintiff at the request of the defendant, will support a promise by the latter, and render it binding, although such trouble and labor may have been unsuccessful, and productive of no benefit or advantage to the defendant. (g)⁴ Where

¹ See page * 2, *ante*, American note.

(b) *Wilkinson v. Oliveira*, 1 Bing. N. C. 490; 1 Scott, 461; *Haigh v. Brooks*, 10 Ad. & E. 320, 334; 4 P. & D. 288; *Thomas v. Thomas*, 2 Gale & Dav. 226; *Westlake v. Adams*, 27 L. J. C. P. 271; 5 C. B. N. s. 249; *Smith v. Smith*, 13 C. B. N. s. 429. (d) *Seaman v. Price*, 1 Ry. & Mood. 195. (e) *Bunn v. Guy*, 4 East, 194; *Jones v. Ashburnham*, ib. 466. (f) *Bailey v. Croft*, 4 Taunt. 611; *Williamson v. Clements*, 1 Taunt. 523. (g) *Sturlyn v. Albany*, Cro. Eliz. 67; *March v. Culpepper*, Cro. Car. 70. (c) *Cheale v. Kenward*, 3 De G. & J. 27; 27 L. J. Ch. 784.

the defendant promised a reward to whoever would give such information as would lead to the conviction of a felon, and the plaintiff gave the necessary *information, it was [* 7] held that the service rendered was a sufficient consideration for the promise, and that the plaintiff was entitled to recover the reward, although he was a constable and police-officer of the district where the felony was committed. (*h*) And where the father of an illegitimate child promised the mother to pay her 2s. 6d. a week if she would abstain from affiliating the child, and the mother did abstain, it was held that the father was bound to make good the weekly payment. (*i*) But a promise, on the abandonment of an immoral connection with a woman, to pay her a sum of money or an annuity, in consideration that she will thenceforth lead a good and virtuous life, is not binding. (*k*)

Works and Services rendered to a Third Party at the Request of the Promisor.¹ — Any service, benefit, or advantage rendered to

¹ To like effect with the text, that services rendered to a third person, though not directly beneficial to promisor, may support his promise to pay for them, are : *Miller v. Drake*, 1 Cai. 45 ; *Ayer v. Hay*, 2 Mill, Const. 365. But a promise to pay must be distinguished from a mere request to render such services. For example, the weight of American authority is that one by merely calling a physician or surgeon to attend a third person does not render himself liable for the fees (*Boyd v. Sappington*, 4 Watts, 247); an express undertaking on his part to pay, or circumstances to warrant an inference to that effect (*Smith v. Watson*, 14 Vt. 332; *Crane v. Boudouine*, 55 N. Y. 256; compare *Potter v. Virgil*, 67 Barb. 578 ; *Bradley v. Dodge*, 45 How. Pr. 57), some relation between him and the patient — father and minor child, for example — by which he is liable for necessities furnished to the latter (*Deane v. Annis*, 14 Me. 26), or a promise to pay, or some other special facts must be shown. A person in fault for inflicting an injury who should call a physician to treat it, probably might be held liable directly to the latter ; but if so it would be on the ground that the moral obligation aided the action. Somewhat of this nature are the cases in which a railroad passenger or employee has been hurt on the road, and some agent of the company has called a physician or surgeon to treat the case. The courts have said that, even conceding that the management of the road was in fault for the injury, so that the company is liable to the sufferer for expenses of treatment, yet it does not follow that the

(*h*) *England v. Davidson*, 11 Ad. & E. 856 ; *Smith v. Moore*, 1 C. B. 438 ; *Thatcher v. England*, 3 C. B. 254 ; 15 L. J. C. P. 241 ; *Lockhart v. Barnard*, 14 M. & W. 674 ; 15 L. J. Exch. 1 ; *Turner v. Walker*, 6 B. & S. 871 ; L. R. 1 Q. B. 641 ; 35 L. J. Q. B. 179 ; s. c. affirmed on appeal, L. R. 2 Q. B. 301 ; 36 L. J. Q. B. 112 ; *Bent v. Wakefield Bank*, 4 C. P. D. 1.
(*i*) *Linnegar v. Hodd*, 5 C. B. 437 ; 17 L. J. C. P. 106 ; *Crowhurst v. Laverack*, 8 Exch. 213.
(*k*) *Binnington v. Wallis*, 4 B. & Ald. 650, *Parke, B.* ; *Jennings v. Brown*, 9 M. & W. 501 ; *Beaumont v. Reeve*, 15 L. J. Q. B. 142.

a third person at the request of the promisor, is a sufficient consideration for the promise. Thus, if one person should say to another, "heal such a poor man of his disease," or "make an highway," and I will give thee so much, and he doeth it, an action lieth at the common law. (l) A captain of a company of foot soldiers, at the request of the defendant, gave leave of absence to a soldier on the faith of a promise by the defendant that the soldier should return in ten days, or that the defendant would pay the captain 20*l.*; and it was held that the leave of absence so given was a sufficient consideration for the defendant's promise, and that the captain, consequently, was entitled to maintain an action for the breach thereof. (m) So, where the defendant promised the plaintiff to pay him 100*l.* if the plaintiff would bail the defendant's servant, who had been cast into prison, it was held that there was a sufficient consideration for the promise. (n) Where the father of an illegitimate child promised to pay the mother an allowance of 60*l.* a year during her life, in consideration that she had at his request undertaken, and then had, the care and nurture of the child, and would thenceforth continue to take charge thereof, it was held that there was a sufficient consideration for the promise, and that the executors of the father, after his decease, were bound to continue the payment of 60*l.* a year to the mother. (o) And where the promise was to pay the mother 100*l.* a year for life if she would [* 8] * bring up the child properly, and the mother did so, it was held that the annuity could not be withdrawn. (p)⁵

medical man can demand payment from the company directly, unless the agent who called him had authority to bind his employers in that regard. An Illinois decision (*Cairo, &c. R. R. Co. v. Mahoney*, 82 Ill. 73) seems to hold that a "general superintendent" has implied authority of this character, while a New York case (*Stephenson v. New York & Harlem R. R. Co.*, 2 Duer, 341) is to the contrary. As to station agents, conductors, and subordinate employees, there is no presumption that they have this authority. A physician who, upon the simple request of one of these, treats one injured by the operation of the road, and charges the company, has the burden of proving that the agent had authority to make the request. A ratification of agent's act, however, though slight, will be sufficient to charge the company. *Cairo, &c. R. R. Co. v. Mahoney*, 82 Ill. 73.

(l) 1 Rolle Abr. Action sur case.

(o) *Jennings v. Brown*, 9 M. & W.(m) *Taylor v. Jones*, 1 Raym. 312.

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(n) *Hunt v. Bate*, Dyer, 272 a.(p) *Hicks v. Gregory*, 8 C. B. 383; 19 L. J. C. P. 81; 7 C. B. 716.

Past Consideration.¹ — Bygone acts or services (*q*) cannot be made a good consideration for a promise. A promise, for example, to pay the plaintiff 20*l.* in consideration that the plaintiff

¹ To like effect with the text are numerous American cases, holding that a consideration already completely executed and past will not support a promise, unless such consideration was induced by the request of the promisor; though a request for value, followed by supplying it, and this followed by a promise to pay for it, creates a legal obligation to make the payment. *Lonsdale v. Brown*, 4 Wash. 148; *Bulkley v. Landon*, 2 Conn. 404; *Carson v. Clark*, 2 Ill. 113; *Allen v. Woodward*, 22 N. H. 544; *Livingston v. Rogers*, 1 Cal. 533; *Comstock v. Smith*, 7 Johns. 87. But the courts favor proof of the necessary anterior request: one may be inferred by the jury from the circumstances of the case. *Hicks v. Burhans*, 10 Johns. 243; *Wilson v. Edmonds*, 24 N. H. 517, 546; *Doty v. Wilson*, 14 Johns. 378.

Services rendered to the United States Government during the war of 1861–65, by volunteers mustered into the Government military service, have repeatedly been held sufficient consideration for a gift or promise by a town of a sum by way of a bounty for volunteering, additional to the soldier's pay as soldier (*Keough v. Scott County*, 28 Iowa, 337; *Kittridge v. Waldron*, 40 Vt. 211; *Seymour v. Marlboro*, *ib.* 171; see also *Hitchcock v. Litchfield*, 1 Root, 206; *Stone v. Danbury*, 46 N. H. 139; *Richardson v. Concord*, 40 Vt. 207); for they enured directly to relieve the town of its obligation to furnish a quota of its inhabitants toward the number of men needed by the Government (*Seymour v. Marlboro*, 40 Vt. 171; *Clark County v. Lawrence*, 63 Ill. 32). In like manner, military service rendered by one individual as substitute for another liable to be compelled to serve, is a sufficient consideration for the latter's promise to pay a sum additional to the substitute's pay. *Harter v. Bomberger*, 47 Pa. St. 492. The liability of municipalities in these cases was placed distinctly on the ground of contract, viz., that, the city or town having offered the bounty, and the volunteer having accepted it, and upon the faith of it enlisted, &c., obligation to pay as promised arose. Hence, without proof of any formal negotiation between corporate authorities and the volunteer, or that he knew of the precise terms of the offer of bounty, he might recover on general evidence that the corporation duly offered a bounty for volunteers, that he acquired knowledge of such an offer being published, and that on the faith of it he enlisted, was credited on the corporation's quota, and served sufficiently to relieve the corporation. *Larimer v. McLean County*, 47 Ill. 36; *Hoboken v. Bailey*, 36 N. J. L. 490; *Davis v. Landgrove*, 43 Vt. 442; *Roach v. Menomee*, 24 Wis. 527; compare, however, *Guyette v. Bolton*, 46 Vt. 228. On the other hand, one who enlisted before offer of bounty was made could not recover merely because he was credited upon the quota of the municipality from which he came, and thus benefited it (*Frey v. Fond du Lac*, 24 Wis. 204); nor because he erroneously supposed an offer had been made, and one afterwards was (*Wells v. Scott County*, 36 Iowa, 141; see also *Amity v. Reed*, 62 Pa. St. 442; *Hoboken v. Bailey*, 36 N. J. L. 490). The enlistment must have been founded on the offer, and have been substantially within its terms. *Carley v. Highgate*, 45 Vt. 273. So a resolution of a municipal council, that the men should be paid an additional bounty, passed after a draft was completed, the quota filled, the men mustered in, and the municipality effectively relieved from the draft, was held void for want of consideration. *Susquehanna Depot v. Barry*, 61 Pa. St. 317.

(*q*) But where there is a request and sufficient to support a subsequent promise, see *infra*.

“had delivered” to the defendant twenty sheep, or a promise to lend the plaintiff 20*l.* in consideration that the plaintiff “had formerly lent” that sum to the defendant, is a *nudum pactum*, and incapable of sustaining an action, (*r*) for, the thing having been done and executed before the promise was made, cannot be said to be a consideration for it; but, if the act has been performed pursuant to the previous request of the party making the promise, then the promise is coupled to the consideration by the request, and is not a *nudum pactum*. (*s*) Thus where the plaintiff brought his action upon a promise made by the defendant to pay the plaintiff 20*l.* in consideration that the plaintiff, at the instance of the defendant, had taken to wife the cousin of the defendant, it was held that the action was maintainable, although the marriage was executed and past before the undertaking and promise were made, because the marriage ensued at the request of the defendant. (*t*)⁶ So where the defendant, having feloniously slain one Patrick Mahume, “required the plaintiff to endeavor to obtain a pardon for him from the king, and the plaintiff journeyed and labored, at his own charges and by every means in his power, to effect the desired object, and the defendant, afterwards, and in consideration of the premises, promised to give the plaintiff 100*l.*,” it was held that, although the consideration was past and gone before the promise was made, yet, inasmuch as the consideration was moved by the previous suit or request of the party,” the promise was binding and capable of sustaining an action. (*u*) But the thing done must, of course, have been advantageous to the defendant, or detrimental or troublesome or inconvenient to the plaintiff, and must be such an act or service as the law recognizes as a legal consideration for a promise. (*x*)

Thus, if a man pays a sum of money or buys goods for me without my knowledge or request, and afterwards I agree to the payment or receive the goods, this subsequent assent is equivalent to

(*r*) *Jeremy v. Goochman*, Cro. Eliz. 442; *Doggett v. Vowell*, Moore, 643; 105; 1 Sm. Lead. Cas.; *Sidman v. Worthington*, Cro. Eliz. 42; *Harris' case*, Dyer, 272 a, n. 31.

(*s*) 1 Wms. Saund. 264.

(*t*) *Dyer*, 272 b; 1 Wms. Saund. 264, 264 a.

(*u*) *Kaye v. Dutton*, 13 L. J. C. P. 187; 7 M. & Gr. 816; *Victors v. Davies*, 12 M. & W. 759.

a previous request, in accordance with the ancient maxim of * the civil law, *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*. (y) A request, too, is frequently implied by law for the purpose of enabling a man to enforce an express promise founded upon a meritorious claim not amounting to a strict legal right. If a man, for example, clothes, feeds, and educates an infant during his infancy, and the latter, after he comes of age, makes an express promise to his benefactor to pay him a certain sum of money in consideration of the benefits so rendered, the law will imply a previous request (z) on the part of the infant for the supply of the necessities of life so furnished.

When the defendant has received and retains the benefit of the consideration, the law will, under some circumstances, imply a request, or permit the jury to infer it, for the purpose of enforcing a meritorious claim. (a)

Failure of Consideration.¹ — Although there be an apparent consideration for the promise, yet, if this consideration should turn out to be false, or to be a nullity, the contract has no legal force or effect, as in the instance put by Pothier. “If upon the false supposition that I owe you 1,000*l.*, left you by the will of my father, which has been revoked by a codicil, whereof I am not apprised, I engage to give you a certain estate in discharge of that legacy, the contract is null; and the falseness of the cause being discovered, you are not only without any right of action to compel me to deliver the estate, but, even if I have delivered it, I am entitled to reclaim it; and my right of action by the Roman law was called *condictio sine causâ*, which is the subject of the title in the digest.” (b) So, if the consideration prove to be a nullity, the promise founded upon it is void, as if the consideration be the forbearance of a suit when there is no cause of action, or the relinquishment of a contract void in law, or a discharge from an arrest wrongfully and illegally made, or a promise to pay a debt which never had an existence in point of law. (c)

¹ The subject of failure of consideration is treated again, as a ground of avoiding the contract, in Book V. ch. ii. § 1, p. * 1182.

(y) 1 Saund. 264, n. 1.

art. 3, § 6; Gough v. Findon, 7 Exch.

(z) Cooper v. Martin, 4 East, 81.

48.

(a) *Post*, bk. 3. ch. 1.

(c) Rosyer v. Langdale, Sty. 248;

(b) Pothier on Obligations, p. 1, c. 1, Hammon v. Roll, March. 202; Atkinson

Written Promises without Consideration. — No superiority was given by the civil law to a written contract over a contract by word of mouth. "For writing cannot change the nature of it, neither can writing amount to a cause or consideration for the promise, but is only made use of for proof." (d) Where the defendant signed a written undertaking to the following [* 10] effect, "I hereby agree to *remain with Mrs. Lees for two years from the date hereof for the purpose of learning the business of a dressmaker," &c., it was held that, as the engagement was all on one side, nothing being contracted to be done or performed by Mrs. Lees as a consideration or inducement for the defendant's remaining two years in her service, it was a *nudum pactum*. (e) So where a memorandum of agreement was made in the following terms, "I, William Bradley, of Sheffield, do agree that I will work for and with John Sykes, of Sheffield, manufacturer of powder-flasks, at such work as he shall order and direct, and no other person whatsoever, from this day henceforth during and until the expiration of twelve months, and so on from twelve months' end to twelve months' end, until I shall give the said John Sykes twelve months' notice in writing that I shall quit his service," it was held that the agreement was a *nudum pactum*, and could not be enforced. (f)⁷

Moral Obligations.¹ — The moral obligation which a parent is under to provide for his child, imposes on him no liability to pay

¹ The American decisions on moral obligation viewed as a consideration for an express promise to do what the obligation requires, by no means warrant saying that a mere moral duty or obligation of conscience will suffice. *Udike v. Titus*, 13 N. J. Eq. 151; *Geer v. Archer*, 2 Barb. 420; *Ehle v. Judson*, 24 Wend. 97. A moral obligation is not deemed a legal consideration, from which alone the law will

v. Settree, Willes, 482; *King v. Hobbs*, 1109; *Young v. Timmings*, 1 Cr. & J. 340; *Hulse v. Hulse*, 17 C. B. 725; 23 L. J. C. P. 177; but see *Pilkington v. Scott*, 15 M. & W. 657, and *Whittle v. Frankland*, 2 B. & S. 57. Probably at the present day an agreement to employ and retain would be inferred from the terms of the contract where they were not actually inconsistent with such a promise. See *Hartley v. Cummings*, 17 L. J. C. P. 84; *Reg. v. Welch*, 2 El. & Bl. 355; 22 L. J. M. C. 145.

(d) Dig. lib. 2, tit. 14, 7; lib. 44, tit. 7, 61; lib. 22, tit. 4, 4; Cod. 4, tit. 30; *Rann v. Hughes*, 7 T. R. 350, 351 n.

(e) *Lees v. Whitcomb*, 2 Moo. & P. 86; 5 Bing. 34.

(f) *Sykes v. Dixon*, 9 Ad. & E. 693; 1 P. & D. 463; *Bates v. Cort*, 3 D. & R. 676; *James v. Williams*, 5 B. & Ad.

v. Settree, Willes, 482; *King v. Hobbs*, 1109; *Young v. Timmings*, 1 Cr. & J. 340; *Hulse v. Hulse*, 17 C. B. 725; 23 L. J. C. P. 177; but see *Pilkington v. Scott*, 15 M. & W. 657, and *Whittle v. Frankland*, 2 B. & S. 57. Probably at the present day an agreement to employ and retain would be inferred from the terms of the contract where they were not actually inconsistent with such a promise. See *Hartley v. Cummings*, 17 L. J. C. P. 84; *Reg. v. Welch*, 2 El. & Bl. 355; 22 L. J. M. C. 145.

the debts incurred by the child; and he cannot be made liable in respect thereof, unless he has given the child authority to

raise an indebtedness (*Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Musser v. Ferguson*, 55 Pa. St. 475), though the rule has sometimes been almost so broadly stated (see *Montgomery v. Lampton*, 3 Met. (Ky.) 519; *Mills v. Wyman*, 3 Pick. 207; *McMorris v. Herndon*, 21 Am. Dec. 515); nor is it a sufficient consideration to support an express promise, except in those cases where there has been an antecedent good or valuable consideration (*Mills v. Wyman*, 3 Pick. 207; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Loomis v. Newhall*, 15 Pick. 159; *Hawley v. Farrar*, 1 Vt. 420; *Nash v. Russell*, 5 Barb. 556; but see *Clark v. Herring*, 5 Binn. 33; *Glass v. Beach*, 5 Vt. 172; *Commissioners v. Perry*, 5 Ohio, 56; *Turner v. Patridge*, 3 Pa. 172; *Barlow v. Smith*, 4 Vt. 139). A promise to pay a demand where there is no legal obligation, is not enforceable merely because the promisor supposed himself liable, though it may be if his liability were doubtful. *Logan v. Mathews*, 6 Pa. St. 417. But by reviving some precedent consideration, such as might, by means of an implied promise, and if it had not been suspended by some positive law, have been used either as a cause of action or a defence, a moral obligation may give the necessary support to a new promise (*Ellicott v. Turner*, 4 Md. 476; *Geer v. Archer*, 2 Barb. 420); or, as the doctrine has been expounded in Rhode Island, a mere moral obligation will not support a promise, when, however, the precedent original consideration is sufficient to sustain the original contract, but the right of action is suspended or barred by some positive rule of statutory or common law, the debtor may, by a subsequent promise, waive the exemption which the law, indirectly for his benefit, but mainly from reasons of sound policy, has interposed (*Shepard v. Rhodes*, 7 R. I. 470; *S. P. Turner v. Chrisman*, 20 Ohio, 332); and the fact that he erroneously supposed himself legally bound when he made the new promise, will not entitle him to equitable relief against it if his moral obligation is clear (*Cardwell v. Strother*, 12 Am. Dec. 326). Thus the decisions are numerous, and have rendered the rule elementary, that a new promise to pay a debt discharged in bankruptcy or insolvency, or barred by the statute of limitations or other operation of law not affecting the creditor's right, does not lack consideration. *Lonsdale v. Brown*, 4 Wash. 86; *Feeny v. Daly*, 8 Cal. 84; *Jamison v. Ludlow*, 13 La. Ann. 492; *Katz v. Moore*, 13 Md. 566; *Erwin v. Saunders*, 1 Cow. 249; *Scouton v. Eislord*, 7 Johns. 36; *Shippey v. Henderson*, 14 Johns. 78; *Turner v. Chrisman*, 20 Ohio, 332; *McKelvey v. Tate*, 3 Rich. 339; *Womack v. Womack*, 8 Tex. 397; *Earnest v. Parke*, 4 Rawle, 452, 7 Am. Dec. 280, and note, *ib.* 287. And in general, it is where the debtor's release from his debt has been given by positive law, and not when the creditor has voluntarily discharged it, that a moral obligation continues which can support his after promise to pay. *Warren v. Whitney*, 24 Me. 561; *Valentine v. Foster*, 1 Met. (Mass.) 520; *Hale v. Rice*, 124 Mass. 292; *Wright v. Clark*, 34 Miss. 116; *Shepard v. Rhodes*, 7 R. I. 470; see, however, *Stafford v. Bacon*, 25 Wend. 384; *Willing v. Peters*, 12 Serg. & R. 177. Also it has been held that an assignment for value of a thing in action creates an equitable obligation on the debtor to make payment to the assignee, which, viewed as a consideration, may support a promise by him to the assignee. *Moar v. Wright*, 1 Vt. 57; *Crocker v. Whitney*, 10 Mass. 316; *Mowry v. Todd*, 12 Mass. 281; *Barney v. Coffin*, 3 Pick. 115; *Morse v. Bellows*, 7 N. H. 549; *Currier v. Hodgdon*, 3 N. H. 82; *Allstan v. Contee*, 4 Har. & J. 351; *Edson v. Fuller*, 22 N. H. (2 Fost.) 183; *Dickerson v. Derrickson*, 39 Ill. 576; *Trafton v. Rogers*, 13 Me. 315; *Warren v. Wheeler*, 21 Me. 484; but see *Woodburn v. Renshaw*, 32 Mo. 197.

For cases in which the prominent question has been whether the particular

incur them, or has contracted to pay them, (*g*) or the child has become chargeable upon the parish, and the parish authorities sue for subsistence money in the mode provided by the poor laws. Very slight evidence has, however, been held sufficient, under certain circumstances, to warrant a jury in inferring the existence of an authority from the parent, so as to fasten a just liability upon the latter. If a tailor furnishes clothes to a boy at school, and the father sees the clothes on the boy's return home, and makes no objection to the tailor, this is sufficient to warrant a jury in finding that there was an implied authority from the father to the tailor to furnish the son with clothes. (*h*) The only duties of the nature of mere moral obligations that will support an express promise are those which could be enforced at common law but for the intervention of some positive rule of law or statutory enactment, which, with a view to the general

benefit, exempts the party in that particular instance [* 11] from liability. Such are *the duties and obligations arising out of the debts and contracts of persons under age, and antiquated legal claims and demands barred by the Statute of Limitations, where the remedy is taken away by a positive rule of law or by express legislative enactment, and the payment of the debt or the performance of the engagement

circumstances of the former debt or transaction were such as to raise a moral obligation sufficient to sustain a new promise, see *Vance v. Wells*, 8 Ala. 399; *Turlington v. Slaughter*, 54 Ala. 195; *Kilbourn v. Bradley*, 3 Day, 376, 3 Am. Dec. 273; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *McElven v. Sloan*, 56 Ga. 208; *Katz v. Moessinger*, 7 Ill. App. 536; *Mills v. Wyman*, 3 Pick. 207; *Nixon v. Vanhise*, 2 South, 491, 8 Am. Dec. 618; *Bentley v. Morse*, 14 Johns. 468; *Stebbins v. Crawford County*, 92 Pa. St. 289; *Scott v. Carruth*, 9 Yerg. 418; *Blodget v. Skinner*, 15 Vt. 716; *Farmers v. Flint*, 17 Vt. 508; *Pritchard v. Howell*, 1 Wis. 131.

A previous legal duty prevents a promise to do the thing from being a sufficient consideration for a counter-promise, though made to induce performance. But previous moral obligation, however strong, does not have this effect; thus, if one not legally bound so to do gives information to a party to a suit as to who are important witnesses for him, and what they will testify, his doing so is a sufficient consideration to support the party's promise made to induce him to do it. *Cobb v. Cowdery*, 40 Vt. 25.

(*g*) *Mortimore v. Wright*, 6 M. & W. C. B. 452; *Ruttinger v. Temple*, 33 L. 482; *Seaborne v. Maddy*, 9 C. & P. 497; J. Q. B. 1.
Urmston v. Newcomen, 4 Ad. & E. 899; (*h*) *Law v. Wilkin*, 6 Ad. & E. 718; 1
 6 N. & M. 454; *Shelton v. Springett*, 11 N. & P. 697; *Baker v. Keen*, 2 Stark.
 501; *Blackburn v. Mackey*, 1 C. & P. 1.

remains a voluntary duty, binding only *in foro conscientiae*. In these instances, and upon such duties and obligations so exempted, an express promise operates to revive the liability and take away the exemption. It revives a precedent good consideration; but it can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statutory provision. (*i*) Thus, a bill of exchange given after the repeal of the usury laws in renewal of a bill given before such repeal to secure the repayment of usurious interest, is valid. (*k*)

Forbearance of Legal or Equitable Rights¹ forms a good consideration for an undertaking, and will make it binding, (*l*) and

¹ A promise to forbear asserting or prosecuting a demand for a reasonable time, in general or specific terms or indefinitely, is a sufficient consideration for a promise to pay (*Lowe v. Weatherly*, 4 Dev. & B. 219; *Ford v. Rehman*, Wright, 434; *Nicholson v. May*, ib. 660; *Silvis v. Ely*, 3 Watts & S. 420); and the promise will not be invalidated by showing merely that the demand could not have been enforced, provided the promisor believed upon reasonable grounds that it could be. *Hargroves v. Cooke*, 15 Ga. 321; *Gilman v. Kibbled*, 5 Humph. 19. But a promise to forbear "for a short time" (*Lonsdale v. Brown*, 4 Wash. 148), or "to wait a while" (*Sidwell v. Evans*, 1 Pa. 383, 21 Am. Dec. 387), is not sufficient, for the plaintiff might have brought his suit in an hour after the promise was made. If the demand is clearly illegal, void, or groundless, a promise made to induce forbearance is without consideration. *Slack v. Moss*, Dudley, 161; *Schnell v. Nell*, 17 Ind. 24; *Palfrey v. Portland*, &c. R. R. Co., 4 Allen, 55; *Sharpe v. Rogers*, 12 Minn. 174; *Sidwell v. Evans*, 21 Am. Dec. 387; and see to the effect that unless it was sustainable either at law or in equity the promise is voidable, *O. & C. R. R. Co. v. Potter*, 5 Oreg. 228. Thus an extension of time for the payment of a debt or performance of an agreement may be a sufficient consideration to support a promise made to induce the extension. *Underwood v. Hossack*, 38 Ill. 208; *Boyd v. Freize*, 5 Gray, 553; *Ford v. Rehman*, Wright, 434; *Bank of Muskingum v. Carpenter*, ib. 729; *Nicholson v. May*, ib. 660; *Silvis v. Ely*, 3 Watts & S. 420; *Clark v. Russell*, 3 Watts, 213; *Sidwell v. Evans*, 1 Pa. 383; *Allen v. Morgan*, 5 Humph. 624; *Templeton v. Bascom*, 33 Vt. 132; *Hill v. Smith*, 34 Vt. 535; *Tuttle v. Bigelow*, 1 Root, 108, 1 Am. Dec. 35; *Hamaker v. Eberley*, 2 Binn. 506, 4 Am. Dec. 477; *Noblet v. Green*, 2 Dev. L. 517, 21 Am. Dec. 347. So a waiver of a legal right given at another's request is a sufficient consideration for a promise by him. *Sykes v. Lafferry*, 27 Ark. 407; *Condly v. Devoe*, 37 Conn. 570; *Boyd v. Frieze*, 5 Gray, 553; *Ripley v. Friede*, 26 Mo. 523; *Sanford v. Huxford*, 32 Mich. 313. The surrender of his claim by a creditor of the estate is a sufficient consideration for a promise by a distributee to pay it. *Calhoun v.*

(*i*) *Wennall v. Adney*, 3 B. & P. 249, n. a.; *Eastwood v. Kenyon*, 11 Ad. & E. 447.

(*k*) *Flight v. Reed*, 1 H. & C. 703; 32 L. J. Exch. 265.

(*l*) *Alliance Bank v. Broom*, 2 Drew. & Sm. 289; 34 L. J. Ch. 256; *Bracewell v. Williams*, L. R. 2 C. P. 196.

this even though no actual benefit accrue to the party undertaking. If the plaintiff, for example, at the request of the de-

Calhoun, 37 Miss. 668. Even an adjournment of a suit in a justice's court has been held a sufficient consideration for an agreement. *Stewart v. M'Guin*, 1 Cow. 99; *Richardson v. Brown*, ib. 255. For an inquiry whether a promise to forbear suing a *bond-fide* demand is any the less a consideration because the demand is groundless, see 16 Am. L. Reg. N. s. 152, *note*.

This principle has been applied: To promises to pay money in consideration of forbearing to prosecute the promisor in bastardy proceedings (*Merritt v. Hemming*, 42 Ala. 234; *Ashburne v. Gibson*, 9 Port. 549; *Coleman v. Frum*, 4 Ill. 378; *Abshire v. Mather*, 27 Ind. 381; *Thompson v. Nelson*, 28 Ind. 431; *Clarke v. McFarland*, 5 Dana, 45); To a guaranty of a note given by a third person in consideration of holder's engagement to forbear for a definite term to sue the maker (*Sage v. Wilcox*, 6 Conn. 81); To a promise given in consideration of an agreement to postpone for a definite term a sale in foreclosure (*Hancock v. Hodgson*, 4 Ill. 329); To a note given in pursuance of an agreement to forbear contesting a will, even though when such note was made the time allowed by law for contesting had expired (*Hindert v. Schneider*, 4 Ill. App. 203); To a promise by a stranger to pay the amount due on an execution, made in consideration of a promise to delay levy and sale (*Russell v. Babcock*, 14 Me. 138); To promise by a third person that he would pay a debt on which suit was pending or threatened, if creditor would discontinue, or suspend, or forbear commencing suit (*Castner v. Slater*, 50 Me. 212; *Stewart v. McGuin*, 1 Cow. 99; *Watson v. Randall*, 20 Wend. 201; *Mechanics', &c. Bank v. Wixon*, 42 N. Y. 438; *Rood v. Jones*, 1 Dougl. (Mich.), 188; and see *Collins v. Barnes*, 83 Pa. St. 15); and it is not necessary that the creditor should discharge the debt, relinquish collaterals, or the like (*Brownell v. Harsh*, 29 Ohio St. 631); To a guaranty of rent given in consideration of landlord's forbearing to eject tenant (*Vinal v. Richardson*, 13 Allen, 521); To a promise not to move to set aside a judgment for fraud, given to induce a stipulation to postpone execution upon it (*Read v. French*, 28 N. Y. 285); To an agreement to divide property in dispute, made to induce withdrawal of legal proceedings for determining the title (*Donner v. Church*, 44 N. Y. 647); To a promise by a third person to pay an infant's debt if creditor would not sue, where the infant on attaining his majority ratified the contract (*Kuns v. Young*, 34 Pa. St. 60); To a second mortgagor's promise to pay a first mortgage if the first mortgagee will not foreclose (*Colgin v. Henley*, 6 Leigh, 85); To an heir's or executor's promise to pay the debt of his ancestor or testator if the creditor would not sue (*Elting v. Vanderlyn*, 4 Johns. 237; *Noblet v. Green*, 2 Dev. L. 517, 21 Am. Dec. 347).

It is said that there must be an engagement to forbear; mere actual forbearance, without a promise to give it, although induced by a third person's promise to pay the debt, is not a consideration. *Manter v. Churchill*, 127 Mass. 31. There must be an engagement to forbear sufficiently definite to give the debtor some new right. *McCann v. Lewis*, 9 Cal. 246. A promise in general words to forbear without indicating any term has been treated as a promise of perpetual forbearance. *Sidwell v. Evans*, 21 Am. Dec. 387; *Hamaker v. Eberley*, 4 Am. Dec. 477; *Clark v. Russell*, 27 Am. Dec. 348; and see *Freeman's note*, ib. 353. But the engagement need not, generally speaking, have been expressed to be for a definite term; that the creditor promised to "wait," to "give further time," or the like, if he actually did grant substantial extension, has been pronounced sufficient. See *King v. Upton*, 4 Me. 387; *Elting v. Vanderlyn*, 4

fendant, forbears to institute legal proceedings, or discontinues legal proceedings already commenced, against a third party for the enforcement of a lawful claim or demand, for any convenient or reasonable period, or suspends or withdraws an execution or a distress against the goods or the person of such third party, the

Johns. 237 ; *Allen v. Pryor*, 3 A. K. Marsh. 305 ; *Rood v. Jones*, 1 Doug. (Mich.) 188 ; *Downing v. Funk*, 5 Rawle, 69 ; *Giles v. Ackles*, 9 Pa. St. 147 ; *McKelvy v. Wilson*, ib. 183 ; *Knapp v. Mills*, 20 Tex. 123. And the forbearance must have been induced by the promise ; future forbearance by the depositors of a banker can form no consideration for an absolute agreement by guarantors to pay the depositors, made without reference to such forbearance. *Steadman v. Guthrie*, 4 Met. (Ky). 147 ; compare *Wager v. Chew*, 15 Pa. St. 323 ; *Hamaker v. Eberley*, 2 Binn. 506, 4 Am. Dec. 477.

Compromises of disputed claims rest upon principles very similar to those governing agreements to forbear. The rule is elementary that a bald promise to take less than is due in full satisfaction of an unquestioned debt cannot be enforced, for it lacks consideration. See U. S. Dig. tit. Debtor and Creditor, III. ib. n. s. Debtor and Creditor ; also Accord and Satisfaction. *Stone v. Lewman*, 28 Ind. 97 ; *Stovall v. Hairstone*, 55 Ga. 9 ; *Line v. Nelson*, 38 N. J. L. 358 ; *Bryan v. Brazil*, 52 Iowa, 350 ; *Warren v. Hodge*, 121 Mass. 106 ; *Pierce v. New Orleans Building Co.*, 9 La. 397, 29 Am. Dec. 448, and note, ib. 452. But if the rights of a claimant are doubtful and are honestly contested, an agreement on the part of the debtor to pay something and on claimant's part to accept that in full, is valid, so far, at least, as the element of consideration is concerned. *Allen v. Prater*, 30 Ala. 458 ; *Motley v. Motley*, 45 Ala. 555 ; *McKinley v. Watkins*, 13 Ill. 140 ; *Field v. Weir*, 28 Miss. 56 ; *Crans v. Hunter*, 28 N. Y. 389 ; *Farmers' Bank v. Blair*, 44 Barb. 641 ; *Rice v. Bixler*, 1 Watts & S. 445 ; *Mayo v. Gardner*, 4 Jones L. 350 ; *Mills v. Lee*, 6 T. B. Mon. 91 ; *Heminy v. Ramsey*, 46 Pa. St. 252 ; *Cavoder v. McKelvey*, Add. 56 ; *Smith v. Smith*, 36 Ga. 184 ; *Hoge v. Hoge*, 1 Watts, 216, 217 ; *Zane v. Zane*, 6 Munf. 406 ; *Taylor v. Patrick*, 1 Bibb, 168 ; *Fisher v. May*, 2 Bibb, 448 ; *Moore v. Fitzwater*, 2 Rand. 442 ; *Kennedy v. Davis*, 2 Bibb, 343 ; *Burnham v. Dunn*, 35 N. H. 556 ; *Long v. Shackelford*, 25 Miss. 559 ; *Barnawell v. Threadgill*, 3 Jones Eq. 50 ; *Moore v. Adams*, 8 Ohio, 372. An agreement to settle a family controversy cannot be considered a nude pact, but may be enforced in equity. *Watkins v. Watkins*, 24 Ga. 402 ; *Smith v. Smith*, 36 Ga. 184 ; *Bailey v. Wilson*, 1 Dev. & B. Eq. 182. Thus when a creditor and his debtor entertain doubts of the validity of the debt, and make an honest compromise of it, a note given by the debtor for the compromise sum agreed on cannot be contested as lacking consideration. *Curry v. Davis*, 44 Ala. 281 ; compare *Pitkin v. Noyes*, 48 N. H. 294. Settlement of a disputed claim for damages is a sufficient consideration for a note given for the compromise amount. *Scott v. Warner*, 2 Lans. 49. So a promise to pay a certain sum as the damages which promisee has sustained through negligence of employees of the promisor, made and accepted as a compromise of his claim for damages, is founded on a sufficient consideration, even though the promisor's liability be doubtful. *Hund v. Geier*, 72 Ill. 393 ; *Honeyman v. Jarvis*, 79 Ill. 318 ; *Husband v. Epling*, 81 Ill. 172. Upon the other hand, a promise to make a payment to compromise a claim which is utterly without ground or foundation, has been pronounced insufficient to sustain an action. *Jarvis v. Sutton*, 3 Ind. 289. A compromise made under a mistake of facts is not binding. *People v. Cooper*, 10 Bradw. 384.

suspension or withdrawal of such execution or distress, or the forbearance of further proceedings, forms a sufficient consideration for a promise by the defendant to pay money to the plaintiff, or to satisfy the full amount of his claim. (*m*) The abandonment and discontinuance of an action brought to enforce a doubtful right or claim are a sufficient consideration for a promise; (*n*) and so is the compromise of a disputed claim made *bona fide*, even although it ultimately appears that the claim was wholly unfounded; (*o*) and, if there be an admitted debt due from one person to another, but disputes and doubts exist as to the exact amount due, the compromise and settlement of the disputes, and the abandonment of the claim to its full extent, form a sufficient consideration for a promise to pay a smaller sum than the amount claimed; (*p*) and, in the case of all unliquidated claims and demands, where the precise amount due has not been fixed and reduced to a certainty by the agreement of the parties, the payment or satisfaction of part of the demand is a good consideration for the discharge of the residue, (*q*) although litigation has not been actually commenced. (*r*) But unless the debt is unliquidated, or some doubt exists as to the exact amount due, a promise by the creditor to discharge the residue on receiving payment of part is *nudum pactum*, and totally inoperative, (*s*) because the debtor is under a legal obligation to pay the whole demand. As a husband has the power of immediately enforcing in a joint action a claim of the wife which accrued to her before the marriage, forbearance by him from so doing is a sufficient consideration to support a promise made to him alone. (*t*) But the mere putting an end

(*m*) *Smith v. Algar*, 1 B. & Ad. 603; 1 Roll. Abr. 24, pl. 33; *Morton v. Burn*, 7 Ad. & E. 19; *Pilkington v. Green*, 2 B. & P. 151; *Sugars v. Brinkworth*, 4 Campl. 46.

(*n*) *Longridge v. Dorville*, 5 B. & Ald. 117; *Stracey v. Bank of England*, 4 M. & P. 639; *Llewellyn v. Llewellyn*, 15 L. J. Q. B. 4. But not the abandonment of a suit, when the plaintiff knows and has admitted that he had no cause of action at all. *Wade v. Simeon*, 15 L. J. C. P. 114.

(*o*) *Callissher v. Bischoffsheim*, L. R. 5 Q. B. 449; 39 L. J. Q. B. 181. See, however, *Ex parte Banner*, 17 Ch. D. 480, *per* Brett, L. J.

(*p*) *Edwards v. Baugh*, 11 M. & W. 641; 12 L. J. Exch. 47.

(*q*) *Wilkinson v. Byers*, 1 Ad. & E. 113; *Watters v. Smith*, 2 B. & Ad. 889.

(*r*) *Cook v. Wright*, 1 B. & S. 559; 30 L. J. Q. B. 321.

(*s*) *Cumber v. Wane*, 1 Str. 425.

(*t*) *Rumsey v. George*, 1 M. & S. 180.

to "certain disputes and controversies," or ceasing to make complaints, or to bore or annoy a man, is an insufficient consideration or foundation in law for an express promise. (*u*)

Adequacy of Consideration.¹—From the preceding remarks it will be perceived that the consideration for a simple contract or promise need not be adequate in point of value. "If there be *any* consideration, the court will not weigh the extent of it." (*x*) It has no means of scrutinizing the varied hidden motives and reasons that may have influenced the parties, and induced them to enter into the contract, nor can it determine upon the prudence or propriety of the transaction. If parties choose to enter into unwise and improvident bargains, they must abide by the consequences of their own rashness and folly; they have contracted for themselves, and the court cannot contract for them (*y*).

¹ In determining adequacy of a consideration, the extent of benefit derivable from it is not considered; a value, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on a parol contract. *Lawrence v. M'Calmont*, 2 How. 426; *Follett v. Rose*, 3 McLean, 332; *Woodruff v. McDonald*, 33 Ark. 97; *Brown v. Budd*, 2 Ind. 442; *Stewart v. State*, 2 Har. & G. 114; *Whitefield v. M'Leod*, 2 Bay, 380; *Knobb v. Lindsay*, 5 Ohio, 468; see *Brachan v. Griffin*, 3 Call, 433; *George v. Richardson*, Gilm. 230; *McKinney v. Pinckard*, 2 Leigh, 149; *Goree v. Wilson*, 1 Bailey, 597; *Meacham v. M'Kie*, 1 Hill (S. C.), 374; *Hubbard v. Coolidge*, 1 Met. (Mass.) 84; *Hind v. Holdship*, 2 Watts, 104, 26 Am. Dec. 107; *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 147, 9 Am. Dec. 736; *Troy Academy v. Nelson*, 24 Vt. 189; *Kidder v. Chamberlain*, 41 Vt. 62; *Randle v. Harris*, 6 Yerg. 508. It is not necessary that the consideration should be equivalent in pecuniary value for the obligation incurred. Thus when a contract is founded on a transfer of articles of property, the court will not in general, on the question of consideration, inquire into actual worth, but will leave the parties to such estimates as they formed when contracting. *Worth v. Case*, 42 N. Y. 362. A valid patent, or any interest or license under one, is deemed, without regard to its pecuniary value or degree of utility, a good consideration for an engagement to buy and pay for it. *Nash v. Lull*, 102 Mass. 60; *How v. Richard*, *ib.* 64, note. But such doctrine, it is said, does not apply to a mere exchange of sums of money, whose value is exactly fixed, but to the exchange of something of indeterminate value in itself, for money, or for some other thing of indeterminate value. Thus a consideration of one cent will not support a promise to pay \$600. *Schnell v. Nell*, 17 Ind. 29. And there is a line beyond which the courts will relieve against contracts as unconscionable, or treat the gross inequality of considerations as a badge of fraud.

(*u*) *Edwards v. Baugh*, 11 M. & W. 641; *Kaye v. Dutton*, 7 M. & Gr. 807; 8 Sc. N. R. 502; *White v. Bluett*, 23 L. J. Exch. 36. *Starlyn v. Albany*, Cro. Eliz. 67; 2 H. Bl. 312; *Pinnell's Case*, 5 Co. 117 a, 117 b.

(*x*) *Ellenborough, C. J.*, 16 East, 372; *Hitchcock v. Coker*, 6 Ad. & E. 457; (*y*) But the consideration must be of some value. *Smith v. Smith*, 3 Leon. 88; 1 Rol. Abr. 23. See as to the rule

In these cases there is an offer which is intended to be accepted by the other party doing the act which forms the consideration; and when the defendant has had the benefit of the consideration for which he bargained, it is no answer to an action brought against him to say that the plaintiff was not [* 13] bound by the contract to do *the act. (z) Thus in the case of guarantees: "Suppose I say, if you will furnish goods to a third person, I will guarantee the payment; there, you are not bound to furnish them; yet, if you do furnish them in pursuance of the contract, you may sue me upon my guarantee." (a) So if a person says, "In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you," the party indemnified is not therefore bound to employ the person designated by the guarantee; but if he does employ him, then the guarantee attaches, and becomes binding on the party who gave it. (b) So where a railway company advertised for tenders for the supply of stores for a period of twelve months, and the defendant sent in a tender to supply the stores "in such quantities as the company's storekeeper might order from time to time," and the company accepted the tender, it was held that the defendant was bound to supply goods ordered before any notice had been given by the defendant to the company of withdrawal of the tender. (c) But it does not follow that, because a householder applies to a gas company for a supply of gas, and is promised a supply, and fits up his premises with stoves and fittings for the purpose of having them warmed and lighted with gas, there is any contract on the part of the company to supply, or on the part of the householder to consume and pay for, gas any longer than either of them may think fit. The householder is not bound to take gas, nor the company to supply it, for a single minute longer than each is minded so to

in equity, *Townend v. Toker*, L. R. 1 Ch. 446, 458; 35 L. J. Ch. 608, 614; *Cheale v. Kenward*, 3 De G. & J. 27; 27 L. J. Ch. 784.

(z) *Tindal*, C. J., 6 Sc. N. R. 106; *Jones v. Robinson*, 1 Exch. 454; 17 L. J. Exch. 36; *Mills v. Blackhall*, 11 Q. B. 358; 17 L. J. Q. B. 31; 12 Jur. 93;

Traité des Obligations, part 1, ch. 1, art. 3, s. 7.

(a) *Morton v. Burn*, 7 Ad. & E. 23.

(b) *Kennaway v. Treleavan*, 5 M. & W. 501; *Offord v. Davies*, 12 C. B. N. S. 748; 31 L. J. C. P. 319.

(c) *Great Northern Ry. Co. v. Wit- ham*, L. R. 9 C. P. 16.

do. (d) So an advertisement of a sale by auction does not amount to a contract with any one who may act upon it that all the things advertised will actually be put up for auction, and that such person will have an opportunity of bidding for them. It is a mere declaration of intention, and not an offer; and persons who attend the sale cannot maintain an action against the auctioneer if the articles advertised are not put up for sale. (e)

Mutual Promises.¹—Bilateral contracts, also, being founded upon mutual promises, are perfected and made binding by the bare consent of the parties, the promise or undertaking of the one party to do one thing being the consideration for the promise of the other to do another. Such are all contracts of sale where the promise or undertaking of the one party to sell forms the consideration for the promise of *the other to [* 14] buy, and where the “bargain is struck” and the con-

¹ For cases explaining or illustrating the doctrine that mutual promises may be a consideration for each other, and form a valid contract before either has been performed, see *Phillips v. Preston*, 5 How. 278; *Funk v. Hough*, 29 Ill. 145; *Downey v. Hinchman*, 25 Ind. 453; *Leach v. Keach*, 7 Iowa, 232; *Crawford v. Paine*, 19 Iowa, 172; *Boies v. Vincent*, 24 Iowa, 387; *Nunnally v. White*, 3 Met. (Ky.) 584; *Pike v. Thomas*, 4 Bibb, 486, 7 Am. Dec. 741; *Babcock v. Wilson*, 17 Me. 372; *Appleton v. Chase*, 19 Me. 74; *Wightman v. Kellogg*, 15 Mass. 1; *Gridley v. Tucker*, 1 Freem. Ch. 209; *Ott v. Garland*, 7 Mo. 28; *George v. Harris*, 4 N. H. 533; *Congregational Society v. Perry*, 6 N. H. 164; *Livingston v. Rogers*, 1 Cal. 583; *Briggs v. Tillotson*, 8 Johns. 304; *Keep v. Goodrich*, 12 Johns. 397; *Tucker v. Woods*, ib. 190, 7 Am. Dec. 305; *Gould v. Banks*, 8 Wend. 562, 24 Am. Dec. 90; *White v. Demilt*, 2 Hall, 405; *Jarvis v. Peck*, 1 Hoffm. 479; *Briggs v. Sizer*, 30 N. Y. 647; *Coleman v. Eyre*, 45 N. Y. 38; *Poughkeepsie, &c. Plank Road Co. v. Griffin*, 21 Barb. 454; *Farrington v. Bullard*, 40 Barb. 512; *Abrams v. Suttles*, Busb. L. 99; *Whitehead v. Potter*, 4 Ired. L. 257; *Forney v. Shipp*, 4 Jones L. 527; *Commissioners v. Perry*, 5 Ohio, 56; *Nott v. Johnson*, 7 Ohio St. 270; *Aldrich v. Lyman*, 6 R. I. 98; *Rice v. Sims*, 8 Rich. 416; *Howe v. O'Malley*, 1 Murphey, 287, 3 Am. Dec. 693; *Cherry v. Smith*, 3 Humph. 19; *Seward v. Mitchell*, 1 Coldw. 87; *James v. Fulmerod*, 5 Tex. 512; *Missisquoi Bank v. Sabin*, 48 Vt. 239. On the necessity of mutuality and what mutuality is sufficient, see *Chambliss v. Smith*, 30 Ala. 366; *Smith v. Morse*, 20 La. Ann. 220; *Getchell v. Jewett*, 4 Me. 350; *Nutting v. McCutcheon*, 5 Minn. 382; *Utica, &c. R.R. Co. v. Brinckerhoff*, 21 Wend. 139, 34 Am. Dec. 220; *Dayton, &c. Turnp. Co. v. Coy*, 13 Ohio St. 84; *Hill v. Roderick*, 4 Watts & S. 221; *Grove v. Hodges*, 55 Pa. St. 504; *Cherry v. Smith*, 3 Humph. 19. See also *ante*, p. * 2, American note 2.

(d) *Haddesdon Gas Co. v. Hazelwood*, 6 C. B. N. s. 249; 28 L. J. C. P. 268. (e) *Harris v. Nickerson*, L. R. 8 Q. B. 286.

tract concluded by the mere assent of the parties. (*f*) Such, also, are all agreements by simple contract between creditors for compounding their debts and releasing their debtor from their several claims, on receiving a part only of the amount due to them, the agreement by one to compound his debt and release the debtor being the consideration for the agreement of the other to do the same; (*g*) also all contracts of marriage, where the promise of the one party to marry is the consideration for the promise of the other party; also all contracts or agreements to enter into partnership, or to make exchanges of lands and chattels, or to refer disputes to arbitration; (*h*) and whenever several parties simultaneously agree for the performance of several duties or services to or for the benefit of each other, there is a binding contract, and an action will lie. (*i*) By-laws for the government of corporations are binding upon all persons who consent to become members of the corporation, as being in the nature of a contract founded upon mutual promises. (*k*) A contract founded upon mutual promises between persons of full age must be obligatory upon both parties, (*l*) so that each may have an action upon it, or neither will be bound. A written agreement, therefore, to submit disputes and differences to arbitration must be signed by all parties before any one can be made liable upon it, as the obligation by all to obey the award of the arbitrator is the consideration to each for his entering into the contract; and, before a plaintiff can succeed in an action upon such a contract, he must show that he had himself engaged to be bound by the award. (*m*) The mutuality of obligation is the very essence of all contracts founded upon mutual promises. "Hence it follows," observes Pothier, "that nothing can be more contradictory to such an obligation than an entire liberty in either of the parties

(*f*) 2 Bl. Com. 447; Noy's Maxims, c. 42; Just. Inst. lib. iii., tit. 23.

(*g*) Boothby v. Sowden, 3 Campb. 175; Wood v. Roberts, 2 Stark. 417.

(*h*) Gower v. Capper, Cro. Eliz. 543; ib. 703, 888; Mansfield v. Stephen, Comb. 256; Hebden v. Rutter, 1 Sid. 180; Holder v. Dickeson, 1 Freem. 95; Gibbons v. Prewd, Hardr. 102.

(*i*) Tipper v. Bicknell, 4 Sc. 462; 3 Bing. N. C. 710.

(*k*) Tobacco Pipe, &c. Co. v. Loder, 16 Q. B. 765; 20 L. J. Q. B. 414.

(*l*) Nichols v. Raynbred, Hob. 88; Sutcliffe v. Brooks, 14 M. & W. 855.

(*m*) Kingston v. Phelps, Peake, R. 299; Biddle v. Dowse, 6 B. & C. 255. An action will lie on a judge's order to refer made by consent, the consent being evidence of an agreement to perform the award. Lievesley v. Gilmore, L. R. 1 C. P. 570; 35 L. J. C. P. 351.

making the promise to perform it or not, as he may please. An agreement giving such a liberty would be absolutely void for want of obligation," (*n*) *i. e.*, so long as the contract remained wholly executory, and nothing had been done under it.

Assent of the Parties.¹—In order to make a contract, there * must be an offer or proposal made by the one [* 15]

¹ Mutual assent—a real meeting of minds upon the same subject-matter and purpose—is of the essence of express simple contracts: this, rather than the writing or language in which it is expressed, constitutes the obligation; and unless the circumstances show or warrant assuming that it existed, the supposed contract will not be enforced. A promise unaccepted, an offer to which assent was not made, either actually or presumptively, creates no obligation. (See *Eliaison v. Henshaw*, 4 Wheat. 225; *Carr v. Duval*, 14 Pet. 77; *Chambliss v. Smith*, 30 Ala. 366; *McKinley v. Watkins*, 13 Ill. 140; *Esmay v. Gorton*, 18 Ill. 483; *Smith v. Weaver*, 90 Ill. 392; *Demoss v. Noble*, 6 Iowa, 530; *Moxley v. Moxley*, 2 Mete. (Ky.) 309; *Erwin v. Bank of Kentucky*, 5 La. Ann. 1; *Belfast, &c. R. R. Co. v. Unity*, 62 Me. 148; *Harlow v. Curtis*, 121 Mass. 320; *Ahearn v. Ayres*, 38 Mich. 692; *Weiden v. Woodruff*, *ib.* 130; *Brown v. Rice*, 29 Mo. 322; *Bruce v. Pearson*, 3 Johns. 534; *Tuttle v. Love*, 7 Johns. 470; *Tucker v. Woods*, 12 Johns. 190; *Shupe v. Galbraith*, 32 Pa. St. 10. This principle is even broader than the law of contracts; for it is said that if the assent of the will of the maker of any instrument is wanting, the result is the same as if the act had been done under duress or during insanity. *Gibbs v. Linabury*, 22 Mich. 479.) Thus a promissory note needs payee's consent to give it legal inception. *Baird v. Williams*, 19 Pick. 381. A notice printed at the head of each page of a register of arrivals at a hotel, stating that money and valuables must be placed in the safe, or the proprietors will not be responsible for loss, will not operate as a contract of the persons who sign their names in the register, without proof that their attention was called to it, and that they signed their names with intent to be bound by it. *Ramley v. Leland*, 6 Robt. 358. Though a contract appear formal and complete, yet if it were understood by the parties as a jest, or as loose, inconclusive conversation, it will not bind (*Armstrong v. McGhee*, Add. 261; *Thruston v. Thornton*, 1 Cush. 89); and this has been held even of a marriage (*McClurg v. Terry*, 21 N. J. Eq. 225). Assent must be manifested; silence does not always give consent. *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262; *Borland v. Guffey*, 1 Grant Cas. 394; *Rutledge v. Greenwood*, 2 Desau. 389. A mere mental determination to accept, without attempt to indicate it to the other party, does not bind the other; neither does an act which does not imply acceptance, though perhaps accompanied by such determination. *White v. Corlies*, 46 N. Y. 467; *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262. But assent need not be formally expressed: it may be given either by writing, by words, or by acts. *Houghwout v. Boisubin*, 18 N. J. Eq. 315; and see *Palmer v. Stephens*, 1 Den. 471; *Speckels v. Sax*, 1 E. D. Smith, 253. It is readily inferred from circumstances, as from a promisee's being present and making no objection (*Slocomb v. Lurty*, 1 Hempst. 431); from his answering without objecting (*Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262); from his availing himself in any manner of the promise (*Attix v. Pelan*, 5 Iowa, 336; *Brusle v. Thomas*, 7 La. Ann. 349); from

(*n*) *Holt v. Ward Clarencieux*, 2 Str. The same rule prevails in the civil and 938. *Pothier, Obligations*, part 1, art 4. French laws.

party to the other, an acceptance of that offer or proposal, and, unless it was clearly not required by the proposer in the

his doing anything under the agreement on his part (*Street v. Chapman*, 29 Ind. 142; *Smith v. Morse*, 20 La. Ann. 220; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372; *McMillan v. Michigan, &c. R. R. Co.*, 16 Mich. 79; *Crook v. Cowan*, 64 N. C. 743; *Patton v. Hassinger*, 69 Pa. St. 311; but see *Morrill v. Telama Consolidated Mill, &c. Co.*, 10 Nev. 125). When words of assent are relied upon as showing the meeting of minds, it is of little consequence how informal they are; any words which manifest actual agreement will suffice. *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. R. Co.*, 4 Gill & J. 1; *Thurston v. Thornton*, 1 Cush. 89. The assent of the two parties must, however, relate to an existing subject-matter (*Gibson v. Pelkie*, 37 Mich. 380); they must assent to the same things and in the same sense (*Hazard v. New England Marine Ins. Co.*, 1 Sumn. 218; *Salters v. Pruyn*, 18 How. Fr. 512); though a party's misunderstanding the effect of language to which he assents will not release him (*Neufville v. Stuart*, 1 Hill. Ch. 159; *Phillip v. Gallant*, 3 Thomp. & C. 618, 1 Hun, 528; *aff'd* 62 N. Y. 256). Where a misapprehension exists between the parties to a contract with reference to its subject-matter, — as where one of them intends to sell a particular thing and the other intends to buy a different thing, or where the parties to a sale suppose the subject of it to be in existence, when, in fact, it has been destroyed, — such misapprehension, if satisfactorily proved, will show that no contract has in fact been made; but the same consequence will not result from a misapprehension of one or both of the parties with reference to the legal effect of the terms of their contract, unless it is altogether unintelligible. *Rice v. Dwight Manuf. Co.*, 2 Cush. 80. Assent must be given with knowledge or means of knowledge of all material facts affecting his legal and equitable rights, and free of every fraud or imposition practised by the other party. *Flagg v. Mann*, 2 Sumn. 489, 563; *Howard v. Carpenter*, 11 Md. 259; *Duncan v. Hogue*, 24 Miss. 671; *Gray v. Murray*, 3 Johns. Ch. 167, 188. It is from the moment when actual mutual assent, manifested in some overt way, exists, that the agreement becomes binding, and knowledge of both that such assent has been given is not essential. *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262, and see *Freeman's* note, *ib.* 305. The assent of the minds of both parties is necessary to constitute a contract; but it is not necessary that the mutual consent of the two minds should occur at the same time. *Sanford v. Howard*, 29 Ala. 684; *Falls v. Gaither*, 9 Port. 605; *Holtzman v. Millaudon*, 18 La. Ann. 29.

In the ordinary course of oral negotiations (except where the offer amounts to an "option" or "refusal" given for a consideration), the proposer may withdraw or modify it at any time before acceptance has been manifested. *Still v. Huidekopers*, 17 Wall. 384; *Sanford v. Howard*, 29 Ala. 684; *Larnon v. Jordan*, 56 Ill. 204; *School Directors v. Trefethren*, 10 Bradw. 127; *Holtzman v. Millaudon*, 18 La. Ann. 29; *Burton v. Shotwell*, 13 Bush, 271. If not withdrawn or modified, an offer made without a limit of time for accepting subsists until acceptance (*Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; *Wylie v. Bryce*, 70 N. C. 442; *Cheney v. Cook*, 7 Wis. 413); yet if acceptance be delayed clearly beyond a reasonable time, the proposer may repudiate it (*Mizell v. Burnett*, 4 Jones L. 249; *McCurdy v. Rogers*, 21 Wis. 197). If the offer be conditional on acceptance within a specified time, acceptance must be signified within that time, or the proposer is released (*Potts v. Whitehead*, 20 N. J. Eq. 55); yet it has been held that where one has "until" a certain day to accept, the acceptance may be made during that day if the offer be still open (*Houghwout v. Boisubin*, 18 N. J. Eq.

first instance, there must be a communication of such acceptance. If the terms of a contract founded upon mutual promises

315). The recipient of a proposal cannot recover as upon a contract, without proving that he took the proper steps to inform the party making the proposal, of his acceptance of it. *Bruner v. Wheaton*, 46 Mo. 363; *Emerson v. Graff*, 29 Pa. St. 358. Giving notice of a refusal to accept is not, ordinarily, necessary. *Corning v. Colt*, 5 Wend. 253. The manifestation of an unqualified acceptance is what completes the contract; without this no contract arises. The acceptance must be absolute, unqualified, unreserved; there can be no effectual acceptance with variations or conditions, until these are agreed to by the other party. To constitute a contract, the minds must meet upon all points. The recipient of a proposal either accepts it, in which case all its terms become binding, or he does not, in which case there is no contract; and the latter case includes his coupling his acceptance with reservations or additional stipulations. *Baker v. Johnson County*, 37 Iowa, 186; *Steel v. Miller*, 40 Iowa, 402; *Belfast, &c. R. Co. v. Unity*, 62 Me. 148; *Bruner v. Wheaton*, 46 Mo. 363; see *Hart v. Bray*, 50 Ala. 446; *Northam v. Gordon*, 46 Cal. 588; *Bethel v. Hawkins*, 21 La. Ann. 620; *Beckwith v. Cheever*, 21 N. H. 41; *Potts v. Whitehead*, 23 N. J. Eq. 512. Giving notice of a partial or conditional acceptance is in legal effect a declination of the original proposal and an offer of a substitute; the party cannot, without the other's consent, abandon his substitute, and reconsider and accept the first proposal. *Fox v. Turner*, 1 Ill. App. 153; *Ortman v. Weaver*, 11 Fed. Reporter, 358. The facts that the person making an offer also pays money by way of earnest or "on account," and that the other retains the sum provisionally, do not necessarily bind the latter in the absence of other acceptance. *Smith v. Weaver*, 90 Ill. 392; *Demuth v. American Institute*, 75 N. Y. 502.

The attempt to apply the principles governing effect of proposal and acceptance to offers made public by advertisement in newspapers, circulars, and the like, is embarrassed by the practical difficulty of determining whether such an advertisement is a proposal open to acceptance, or only a declaration of intention or invitation of proposals. No one understands that an ordinary merchant's advertisement of goods for sale, an announcement of a lecture or sermon, a handbill of a play, or the like, is a proposal in such sense that any one of the general public who signifies acceptance before it is withdrawn may claim a breach of contract if it is not fully performed. Yet of railroad time-tables it has been held (as explained *post*, p. *528) that advertising them is an offer to carry any ticket-buyer at the hours named; and that buying a ticket and applying for passage are an acceptance. The cases do not enable one to draw a clear line between advertisements which are proposals open to acceptance, and those which are not. (For special cases on this question, see *Babcock v. Raymond*, 2 Hilt. 61; *Demuth v. American Institute*, 75 N. Y. 502.)

Of advertisements that proposals will be received for the contract to furnish supplies, execute a public work, and the like, it has been held that they do not (unless by force of some special enactment) oblige either individuals or public officers putting them forth to award the contract to any individual bidder, even though he may be the lowest one, and his bid fully within the conditions. They are in the nature of an invitation: the bids under them are the proposals, and the decision of the advertiser approving one of these is the acceptance which completes the contract. Unless such acceptance is signified, there is no agreement, and it may be withheld without any breach of contract. Indeed, as such advertisements are now usually drawn, all question of this kind is prevented by a clause ex-

have not been finally agreed upon, if either party withholds, or has not given, his full assent to them, the contract is incomplete; it binds neither of the parties, and can give rise to no cause of action. (*o*) Where a proposal or tender is accepted, subject to the terms of a contract being arranged and drawn up for signature, there is no concluded bargain until the terms have been arranged and a written contract executed. (*p*) But an acceptance enclosing a more formal memorandum for signature is sufficient, if the memorandum contains no new terms. (*q*) And where there is a reference made in a written acceptance of a building contract to the fact that a contract will afterwards be prepared, that may only be for the purpose of expressing the agreement already made in more formal language. (*r*) It has been doubted whether the words "subject to the title being approved by our solicitor" would show that the contract is not complete. (*s*) But it has been held that the words, "this offer has been made subject to the conditions of the lease being modified to my solicitor's satisfaction," did not prevent the completion of the contract. (*t*) A proposed contract is in general not binding on the party who proposes it until the acceptance of

pressly reserving a right to reject any and all bids; but such clause is probably not strictly necessary to protect the advertiser. *People's R. R. v. Memphis R. R.*, 10 Wall. 38; *Argenti v. San Francisco*, 16 Cal. 255; *Logansport v. Blakemore*, 17 Ind. 318; *Baldwin v. Commonwealth*, 11 Bush, 417; and see *Topping v. Swords*, 1 E. D. Smith, 609; *People v. Croton Aqueduct Board*, 49 Barb. 259; *Matter of Prot. Ep. Public School*, 58 Barb. 161; 40 How. Pr. 139; *Jones v. Lynds*, 7 Paige, 301; *Smith v. New York*, 10 N. Y. 504; *People v. Smith*, 12 Abb. Pr. 133, 26 Barb. 240; *Altamus v. New York*, 6 Duer, 446; *Highland County v. Rhoades*, 26 Ohio St. 411; *State v. Shelby County*, 36 Ohio St. 326. The advertisements and proposals for a government contract do not even form a part of the contract, unless referred to in it. *Harvey v. United States*, 8 Ct. of Cl. 501.

As to advertisements offering rewards, see *post*, p. * 24, and American note.

(*o*) *Routledge v. Grant*, 1 Moo. & P. 717; Bing. 653; *Cope v. Allinson*, 8 Exch. 185; *Felthouse v. Bindley*, 11 C. B. N. S. 869; 31 L. J. C. P. 204.

(*p*) *Kingston-upon-Hull v. Petch*, 10 Exch. 610; 24 L. J. Exch. 23; *Chinnock v. Ely*, 4 De G. J. & S. 638; *Honeyman v. Marryat*, 26 L. J. Ch. 619; *Appleby v. Johnson*, L. R. 9 C. P. 158; *Brogden v. Metropolitan Ry. Co.*, L. R. 3 Ap. Ca. 666; *Winn v. Bull*, 7 Ch. D.

29. And see *Heyworth v. Knight*, 17 C. B. N. S. 298; 33 L. J. C. P. 298.

(*q*) *Gibbons v. N. E. Metropolitan Asylum District*, 11 Beav. 1.

(*r*) *Lewis v. Brass*, 3 Q. B. D. 667; *Rossiter v. Miller*, 3 Ap. Ca. 1124.

(*s*) *Hussey v. Horne Payne*, 4 Ap. Ca. 311.

(*t*) *Bonnewell v. Jenkins*, 8 Ch. D. 70, C. A.

the other party has been communicated to him or his agent. (*u*) Thus, if a man applies for shares in a company, and the directors allot them to him, and, after the allotment, but before it is communicated to the applicant, he withdraws his application, there is no complete contract, and he is not bound to accept them. (*x*) But although the applicant must have notice of the fact of the allotment, yet it is not necessary that a formal notice should be sent to him. It is enough if he is made aware that the company have accepted his application; but the mere entry of his name on the register of shareholders is not sufficient for this purpose. (*y*) An offer of a * contract sent by [* 16] letter cannot be withdrawn by merely posting a subsequent letter which does not in the ordinary course of the post arrive until after the offer has been accepted. (*z*) A promise of marriage, so long as it remains unaccepted, amounts to a mere proposal or offer, which may be retracted at any time. Before, therefore, the plaintiff can succeed in an action upon such a promise, it must be shown that he or she accepted the proposal, and so entered into a corresponding engagement; and this acceptance may be proved and established by the conduct of the party, as well as by express words. And if an offer is made to another party, and in that offer there is a request, express or implied, that he must signify his acceptance by doing some particular thing, then, as soon as he does that thing, he is bound. (*a*) Where in a lease there is an option to purchase upon giving notice, there is a binding contract as soon as notice is given. (*b*) If an offer has been made by one man to sell goods to another, such offer is not, of course, binding until it has been accepted by the party to whom it has been made, as the one cannot be held liable to the other for not selling the goods, unless that other, by accepting the offer, has bound himself to purchase. Where the defendant proposed to sell goods to the

(*u*) *McIver v. Richardson*, 1 M. & S. 557; *Mosley v. Tinklen*, 1 C. M. & R. 692.

(*x*) *Hebbs' case*, L. R. 4 Eq. 9; 36 L. J. Ch. 748; *Graham, Ex parte*, 30 L. J. Bk. 42; Ch. 861; *Pellatt's case*, L. R. 2 Ch. 527; 36 L. J. Ch. 613.

(*y*) *Gunn's case*, L. R. 3 Ch. 40; 37 L. J. Ch. 40.

(*z*) *Byrne v. Van Tienhoven*, 5 C. P. D. 345.

(*a*) *Brogden v. Metropolitan Ry. Co.*, 2 Ap. Ca. 666; *per* Lord Blackburn, 691.

(*b*) *Mills v. Haywood*, 6 Ch. D. 196, C. A.

plaintiff at a fixed price, and gave him, at his request, a certain time to determine whether he would buy them or not, and the plaintiff, within the time, determined to buy them, and gave notice thereof to the defendant, and offered to pay the price, but the latter then receded from his offer, and refused to deliver the goods and accept the money: it was held, in an action for the non-delivery of the goods, that there was no complete contract of sale; that, as the plaintiff was not by the original contract bound to purchase, there was no consideration to bind the defendant to sell; and that the engagement was all on one side, and was therefore a *nudum pactum*. (c) This case, however, does not appear to be satisfactory, as the plaintiff seems to have accepted the offer before the withdrawal of it. A proposal once made is always open for acceptance until it is withdrawn to the knowledge of the other party, and such other party has the option of accepting the proposal until the moment when he receives notice of withdrawal. (d) And, where there was a proposal by the defendant to take a lease from the plaintiff on certain terms, and to this proposal the plaintiff was to give a definite answer within six weeks, it was held that, if [* 17] six weeks are given by one party to accept an * offer, the other has the same period to put an end to it. The contract must be mutual; and the one party cannot be bound without the other. (e) If, however, anything has been given or done as the consideration for the promise — if, for instance, the party to whom it is made has agreed to incur any expense or labor in consideration of the offer being continued or kept open for a certain time — then the party making the offer is not at liberty to retract it. When the promise has been accepted and the contract concluded, the acceptance cannot be revoked; and neither party is at liberty, without the consent of the other, to rescind the contract, or “be off” from his bargain. (f) But if the party to whom the offer is made does not accept it in the very terms in which it is made, and some new qualification or condition is annexed to the acceptance, the party making the

(c) *Cooke v. Oxley*, 3 T. R. 653.(e) *Best, C. J., Routledge v. Grant*,(d) *Bryne v. Leon van Tienhoven*, 49 4 Bing. 653; 1 Moo. & P. 731.L. J. C. P. 316; *Stevenson v. McLean*,(f) *Grant v. Hunt*, 1 C. B. 44.

5 Q. B. D. 346.

offer is, of course, not bound by the acceptance. (*g*) But an acceptance is not made conditional by an addition which is immaterial, (*h*) nor by the existence of a misunderstanding between the parties as to the construction of collateral terms not part of the agreement itself. (*i*) So if there is a conditional offer and an unconditional acceptance there is no contract. (*k*) If a time is prescribed within which the proposal must be accepted, the offer comes to an end at the expiration of that time, and a subsequent acceptance is ineffectual. If no time is prescribed, the acceptance must be made and notified within a reasonable time. (*l*)

An offer to sell may be withdrawn before acceptance without any formal notice, as where the person who makes the offer sells the thing to a third person; even, as it should seem, although the person to whom the offer was made has no knowledge of the sale. (*m*)

The contract dates from the acceptance, not from the date of the offer. (*n*)

Where a person accepts an offer, he must not adopt the proposed terms, and yet slightly vary them, without calling the attention of the party making the offer to the fact of the variation. (*n*)⁸

Biddings at an auction are mere offers, which may be retracted * at any time before the hammer is down [* 18] and the offer has been accepted. Where the defendant had retracted his bidding at an auction, the court said: "The assent of both parties is necessary to make the contract binding: that is signified on the part of the seller by knocking down the

(*g*) *Duke v. Andrews*, 2 Exch. 290; 17 L. J. Exch. 231; *Gilkes v. Leonino*, 4 C. B. N. S. 501; *Jordon v. Norton*, 4 M. & W. 161; *Addinell's case*, L. R. 1 Eq. 225; 35 L. J. Ch. 75; *Cropley v. Maycock*, L. R. 18 Eq. 180; *Stanley v. Dowdeswell*, L. R. 10 C. P. 102; *Jackson v. Turquand*, L. R. 4 H. L. 305; *Wynn's case*, L. R. 8 Ch. 1002; *Beck's case*, L. R. 9 Ch. 392.

(*h*) *Clive v. Beaumont*, 1 De G. & S. 397.

(*i*) *Baines v. Woodfall*, 6 C. B. N. S. 657, 676; 28 L. J. C. P. 338.

(*k*) *Shakleford's case*, L. R. 1 Ch. 567; *Roger's case*, L. R. 3 Ch. 633.

(*l*) *Ramsgate Victoria Hotel Co. v. Montifiore*, L. R. 1 Ex. 109; 4 H. & C. 164; 35 L. J. Ex. 90; *Bailey's case*, L. R. 5 Eq. 428; 3 Ch. 592.

(*m*) *Dickenson v. Dodds*, 2 Ch. D. 463.

(*n*) *Proprietors of English and Foreign Credit Co. v. Arduin*, L. R. 5 H. L. 64.

hammer, which was not done till the defendant had retracted. An auction is not unaptly called *locus penitentiae*. Every bidding is nothing more than an offer on the one side, which is not binding on the other side till it is assented to." (o)

Acceptance of Offers made by Post.¹ — Where the defendants wrote to the plaintiffs, making them an offer of merchandise at

¹ When proposal and acceptance are communicated by letters passing through the mails, two peculiar questions arise : At what time is the contract completed ? Which is the place of the contract ? The current of American authority regards the moment of mailing the acceptance as the time, and the place where this is done as the place, at which the contract is made.

There is an apparent inconsistency in treating the mailing an acceptance as completing the contract, for until the proposer receives it how can it be said that the minds have met ? Suppose that the proposal is meantime withdrawn, or that the acceptance miscarries altogether ? Theoretic answers to these difficulties are, that sending a letter containing a proposal is a continuing offer, and mailing an acceptance is a complete meeting of minds in fact, and proposer's knowledge of it at the moment is not needful ; also that, by adopting the mail as the medium of proposing, the proposer impliedly consents to it for transmission of answer, hence mailing is a delivery to him per agent. A practical reason advanced in *Adams v. Lindsell*, 1 Barn. & Ald. 681, has probably had greater influence. The question there being whether plaintiffs' mailing an acceptance bound defendants to perform what they had by mail proposed, the court said that if it did not, "no contract could ever be completed by post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till they had received notification that the defendants had received their answer, and assented to it. And this might go on *ad infinitum*." Or, as was said in *Dunlop v. Higgins*, 1 Ho. of L. Cas. 381, "Common sense tells us that transactions cannot go on without such a rule;" or in *Thompson v. James*, 18 Dunl. 1, "no contract could ever be safely proposed by letter if the acceptance must arrive before the contract is completed." Upon one ground or another, and notwithstanding some doubts and conflict in earlier cases, the rule is now well established, that timely mailing of an acceptance sufficiently addressed and prepaid completes the contract, irrespective of the fate of the letter or of any notice of revocation arriving afterward. *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390 ; *Britton v. Phillips*, 24 How. Pr. 111 ; *Falls v. Gaither*, 9 Port. 605 ; *Averill v. Hedge*, 12 Conn. 424 ; *Levy v. Cohen*, 4 Ga. 1 ; *Moore v. Pierson*, 6 Iowa, 279 ; *MacKay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35 ; *Kentucky Mut. Ins. Co. v. Jentes*, 5 Ind. 96 ; *Chiles v. Nelson*, 7 Dana, 281 ; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80 ; *Wheat v. Cross*, 31 Md. 99 ; *Stockham v. Stockham*, 32 Md. 196 ; *Lungstrass v. German Ins. Co.*, 48 Mo. 201 ; *Abbott v. Shepard*, 48 N. H. 14 ; *Halleck v. Commercial Ins. Co.*, 2 Dutch. 80 ; *Potts v. Whitehead*, 20 N. J. Eq. 55 ; *MacTier v. Frith*, 6 Wend. 103 ; *Vassar v. Camp*, 11 N. Y. 441, aff'g 14 Barb. 341 ; *Trevor v. Wood*, 36 N. Y. 307 ; *Myers v. Smith*, 48 Barb. 614 ; *Beardsley v. Davis*, 52 Barb. 159 ; *Britton v. Phillips*, 24 How. Pr. 111 ; *Hamilton v. Locomot. Ins. Co.*, 5 Pa. St. 339 ; *Washburn v. Fletcher*, 42 Wis. 153. The general drift of American opinion is well expressed by Justice Nelson in *Taylor v.*

(o) *Payne v. Cave*, 3 T. R. 148 ; *Warlow v. Harrison*, 1 E. & E. 395 ; 28 L. J. Q. B. 18.

a fixed price, they "receiving an answer in course of post," it was held that there was a binding contract of sale the moment

Merchants' Fire Ins. Co., 9 How. 390, as follows: "On the acceptance of the terms proposed, transmitted by due course of mail, the minds of the parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has the right to regard it as intended as a continuing offer, until it shall have reached him, and shall be in due time accepted or rejected." So a contract founded on a proposal by letter transmitted through a messenger is completed by delivery of an answer containing acceptance to the messenger, and is not postponed till the delivery of it by him to the proposer. *Bryant v. Booze*, 55 Ga. 438; *Fox v. Turner*, 1 Ill. App. 153.

Rulings on matters of detail connected with the letter of acceptance have been that it must be distinctly expressed; there must be some overt act; an intention to insert in a letter an acceptance of an offer, if it is accidentally omitted, is of no effect (*Fox v. Turner*, 1 Ill. App. 153; *Lungstrass v. German Ins. Co.*, 48 Mo. 201; see also *Chicago & C. Ry. Co. v. Dane*, 43 N. Y. 240); that the acceptance must be unconditional; a proposal to accept, or acceptance upon terms varying from those offered, is a rejection of the offer (*Eliason v. Henshaw*, 4 Wheat. 225; *Esmay v. Gorton*, 18 Ill. 483; *Baker v. Johnson County*, 37 Iowa, 186; *Jennes v. Mt. Hope Iron Co.*, 53 Me. 20; *Myers v. Smith*, 45 Barb. 614; *Bruce v. Pearson*, 3 Johns. 534; *Tuttle v. Love*, 7 Johns. 470); that it must be posted within the time limited by the offer, if any (*Maclay v. Harvey*, 90 Ill. 525; *Taylor v. Renuie*, 35 Barb. 272; 22 How. Pr. 101); if none, then within a reasonable time, else the proposer is discharged (*Martin v. Black*, 21 Ala. 721; *Chicago & C. Ry. Co. v. Dane*, 43 N. Y. 240) and four months is too long a delay (*Chicago & C. Ry. Co. v. Dane*, 43 N. Y. 240); that if delivery of the letter containing the offer is delayed by fault of the sender, as where he misdirects it, the offer stands extended, and the addressee has a reasonable time after receipt to answer (*Martier v. Frith*, 6 Wend. 103; *Averill v. Hedge*, 12 Conn. 424; that to deposit the acceptance in the post-office without prepayment of postage is not sufficient (*Britton v. Phillips*, 21 How. Pr. 111); that if delay in transmission is attributable to fault of the accepting party, the other is not bound (*Thayer v. Middlesex Mut. Fire Ins. Co.*, 10 Pick. 326; *Bryant v. Booze*, 55 Ga. 438); and that change in *personnel* of firm to whom proposal is made by letter, as where new members are taken in without proposer's knowledge between receipt of proposal and mailing acceptance, may defeat it (*National Bank v. Hall*, 101 U. S. 43).

It might be thought that, by analogy, a letter revoking a proposal sent by mail should be deemed effective from the moment of posting it: but such is not the rule: revocation of an offer does not take effect until received, and if before then an acceptance has been posted, the revocation is inoperative. This is a necessary result of the rule that mailing acceptance closes the contract, and most of the cases above cited to that rule support this, either directly or by implication. If the proposition be made in writing and sent by post, the person making the offer can retract by a subsequent letter reaching the other party at any time before an acceptance is written and put in the mail; but as soon as such answer is placed in the mail the contract is completely closed as to both parties. Although, therefore, a letter containing a retraction of the offer be actually on the way at the time when the letter of assent is mailed, yet the contract is closed unless such letter of retraction be received previous to the mailing of the assent. *Story*, Cont. § 498; see also *Eskridge v. Glover*, 5 Stew. & P. 264; *Wheat v. Cross*, 31 Md. 99. It

the letter accepting the offer was posted, and that the defendants were not at liberty to retract their offer before the arrival of the time for receiving the answer; otherwise, it was observed, no contract could ever be completed by post. In this case the defendants misdirected a letter, and so caused a delay in its receipt and in the return of the answer, and, not having received the answer at the expected time, they sold their merchandise to another person; and it was held that, as the delay had been occasioned by their own neglect, and not by any omission or

is said that an offer made by mail may be countermanded by telegraph, while on the way; but an acceptance once mailed may not be revoked by telegraph. 14 Am. L. Reg. 410.

A great number of cases reiterate that the letter of acceptance must signify assent to the terms proposed without reservation or condition; if any variations are suggested (other than such as can be disregarded as immaterial) there is no contract; but this is only applying a familiar general rule of all consensual contracts to the case of contract by letter. See *ante*, p. * 15, American note 1. The whole subject of contracts by correspondence is discussed in detail in articles in 22 Alb. Law J. 424; 32 Am. Rep. 40; 10 Cent. L. J. 63; West. Jur. 337. For civil-law views of it, see 7 Am. L. Rev. 430; also Lang. Cas. Contr. 155; Pothier on Sales, No. 32.

The following decisions are found on the question whether, when the correspondence moves between towns in different States, the place where the acceptance is mailed or that where it is received is deemed the place of making the contract.

Where A, being in a State where the sale of lottery tickets was unlawful, wrote to B in a State where the sale was lawful, to purchase tickets,—*held*, that the sale was completed in the State where the assent was given by mailing a letter of acceptance. *McIntyre v. Parks*, 3 Met. (Mass.) 207.

Where a person orders goods by a letter mailed in one State, but addressed to and delivered in another State, and the goods are put up for him in the latter State, and there delivered to a carrier, the contract is generally to be deemed made in the latter State, and its validity, even as regards the capacity of the person writing the letter to make the contract, will be determined by the law of the latter State. Thus a guaranty signed in Massachusetts by a married woman there domiciled, and sent by mail to another State, and assented to and acted upon there, may be enforced by action in Massachusetts if, by the law of the other State, a married woman might give such a guaranty. *Milliken v. Pratt*, 125 Mass. 374. See *Northampton, &c. Co. v. Tuttle*, 40 N. J. L. 476; *Shattuck v. Life Ins. Co.*, 4 Cliff. 598.

When negotiations for a contract are carried on between two parties living in different States, partly by the interchange of letters and partly by oral communications through an agent, the contract is regarded as made in the State or place where it first takes effect, so as to become a binding obligation upon both parties. Where the plaintiff, being in New York, agreed in this manner with defendant, the manager of an opera in Philadelphia, to go there and make her *début*, she to be assured, if she did not fail in the estimation of the public and the press, of an engagement between the parties,—*held*, that the contract was not made in New York, but in Philadelphia, conditionally upon her fulfilling the test of success. *Waldron v. Ritchings*, 9 Abb. Pr. N. s. 359.

default on the part of the plaintiff, the answer must be taken to have come back in due course of post, and that the defendants were liable upon the contract for the damage sustained by the plaintiff by reason of his loss of the bargain and of the non-delivery of the goods. (*p*) If the letter in acceptance of the offer miscarries, and never reaches its destination, the contract is nevertheless complete, (*q*) unless the miscarriage is owing to the fault of the sender. But a man is not bound by communicating his acceptance to his own agent only; in order that the contract may be complete and the acceptance *irrevocable, [* 19] there must be a communication of the acceptance to the proposer or his agent. (*r*)

Contracts made by Telegram.¹—Where an order is sent by telegram, the post-office authorities are only agents to transmit the message in the terms in which it is delivered to them, and if the telegraph clerk makes a mistake in the transmission there is no binding contract. (*s*)

Contracts by Deed are contracts in writing sealed and delivered by the parties to them. No cause, motive, or consideration beyond the mere will of the party making the contract is necessary to give them validity; and no one can be permitted

¹ See *post*, p. * 56, where the subject is mentioned again, and the American view is given.

(*p*) *Adams v. Lindsell*, 1 B. & Ald. 681; *Potter v. Saunders*, 6 Hare, 1; *Newcombe v. De Roos*, 2 E. & E. 270; 29 L. J. Q. B. 4; *Taylor v. Merchants' Fire Insurance Co.*, 9 How. S. C. 390.

(*q*) *Dunlop v. Higgins*, 1 H. L. C. 381; *Duncan v. Topham*, 8 C. B. 225. Some doubt has lately been thrown on this point in *British American Telegraph Co. v. Colson*, L. R. 6 Ex. 108; 40 L. J. Ex. 97; See also *Reidpath's case*, L. R. 11 Eq. 86; and *Townsend's case*, L. R. 13 Eq. 148; *British American Telegraph Co. v. Colson* has, however, been disapproved of in *Harris's case*, L. R. 7 Ch. 587; 41 L. J. Ch. 621; and *Walls' case*, L. R. 15 Eq. 18; and has been overruled in *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216, C. A.

Perhaps the true rule is that, if the person making the offer has expressly or impliedly authorized the receiver of the offer to send an answer by post, the person making the offer is bound when the letter containing acceptance is posted, on the ground that he has constituted the post-office his agent to receive the acceptance; but that when no such authority is expressed or can be implied, the person making the offer is only bound when the acceptance actually reaches him. See *per* Thesiger, L. J., p. 218, *ib.*, and *per* Lord Blackburn, in *Brogden v. Metropolitan Ry. Co.*, 2 Ap. Ca. 691.

(*r*) *Ante*, p. * 15.

(*s*) *Henkel v. Pape*, L. R. 6 Ex. 7; 40 L. J. Ex. 15.

(except on the ground of fraud or deceit) to aver or to prove anything in contradiction to what he has solemnly and deliberately avowed by deed. (*t*) The courts, however, will not enforce specific performance of a voluntary covenant; (*u*) and, for the purpose of ascertaining whether a covenant is voluntary or otherwise, it may be shown that there was in fact no consideration, although one is expressed on the face of the deed, (*x*) or that there was a good consideration, although the deed only expresses a nominal one, (*y*) or none at all. (*z*)

Authentication by Deed.—The use of seals for the authentication of contracts and writings appears to have been almost unknown in England prior to the Conquest. Under the Anglo-Saxon government, contracts and written declarations and memorials were solemnly ratified with the sign of the cross in the presence of numerous witnesses, and derived all their force and efficacy from their publicity. (*v*) The custom of using a seal has prevailed in the far East from the most remote antiquity down to the present time. (*b*) The practice was brought into general use in England by the Normans after the Conquest, who caused the ancient Saxon contracts and writings to be sealed with waxen seals in the presence of witnesses, and gave them the names of charters or DEEDS. (*c*)

(*t*) *Sharington v. Strotton*, Plowd. 1, 308 a, 309; *Morley v. Boothby*, 3 Bing. 111; 10 Moore, 404; *Fallowes v. Taylor*, 7 T. R. 477; *Shubrick v. Salmond*, 3 Burr. 1639; 1 Fonbl. Eq. 344, *n. u.*; 2 Finch, 108, 110.

(*u*) *Kekewick v. Manning*, 1 De G. M. & G. 176, 188.

(*c*) *Wilson v. Keating*, 28 L. J. Ch. 898.

(*y*) *Leifchild's case*, L. R. 1 Eq. 231.

(*z*) *Llanelly Railway and Dock Co. v. London and North-Western Ry. Co.*, L. R. 8 Ch. 942.

(*a*) *Madox*, Dissert. xxvi. form. Angl. pp. 115, 131, 136, 176; *Spelman's Gloss.* p. 228; *Monast. Angl.* vol. 5, p. 269, col. 1.

(*b*) *Esther*, c. 8; *Jeremiah*, c. 32; 1 *Kings*, c. 21. See also *Daniel*, c. 6;

Lanc's Arabian Nights, note 11, p. 26. See the *Arabian Nights*, *passim*, as to the use of seals, and the story of the amorous lady and the ninety-eight "seal-rings" of her different lovers.

(*v*) *Ingulph*. p. 901; *Selden*, *Eadmeri Hist.* p. 166, ed. 1623. As to the use of seals, see *Dugl. Antiq. Warwickshire*, p. 972; *Dufresne*, *Gloss. tom. 3*, p. 854; *Stabilimenta S. Ludov. Reg. Fran. lib. 1*, c. 70, 71. *Monast. Angl. tom. 1*, p. 810; *Selden's Titles of Honor*, part 2, c. 5, pp. 651, 652; *Dufresne*, *tom. 3*, p. 854. One of the most ancient sealed documents of any authenticity in England is the charter of Edward the Confessor to Westminster Abbey. *Co. Litt.* 7 a, speaks of a *sealed* charter as early as A. D. 956. *Vin. Abr. Faits*, 20.

*** Requisites of Deeds.** — “Every deed ought to have [* 20] writing, sealing, and delivery; and if the parties be illiterate, it ought to be read also.” It may be printed or written on parchment or paper; and it is good and valid, although it mention no time or date or place of making, or be dated at one time and delivered at another, or have a false or impossible date. It is essential only that it be sealed and delivered; for “any agreement in writing sealed and delivered becometh a deed.” (*d*) By the common law, a deed may be written in any hand or in any language; but the legislature has required all “certificates, patents, charters, bonds, records, judgments, statutes, and recognizances” to be written in the *English* language. (*e*) Signing is not essential to the validity of a deed at common law; (*f*) and the statute of frauds, which requires certain contracts to be authenticated by a signed writing, does not extend to deeds. (*g*) It now rarely happens that the party executing a deed actually seals it with his own hands, or with his own seal. The seal is fixed or compressed on the deed by the person professionally employed, the executing party merely acknowledging, in the presence of witnesses, the seal to be his seal. It has been held also that one and the same seal may be the seal of half-a-dozen persons at the same time; for, “if one of the officers of the forest put one seal to the rolls by assent of all the verderers and other officers, it is as good as if every one had put his several seal; as in case divers men enter into an obligation, and they all consent, and set but one seal to it, it is a good obligation of them all.” (*h*) But they must all be actually present consenting to the act; otherwise the execution is not good. (*i*) The sealing, or the acknowledgment of the seal, must be made after the deed has been written, and before its delivery; for if a blank piece of paper or parchment be sealed and delivered, and afterwards written upon, it is no deed; (*k*) and if endorsements or schedules are written or annexed to deeds after their execution, the deed must

(*d*) 11 Co. 27 b, 28 a.; Co. Litt. 171 b.; Shep. Touch. 1 ch. 4.

(*e*) 4 Geo. 2, c. 26.

(*f*) 1 Sugd. Powers, 297; Prest. Shep. Touch. 56 b.; Cooch v. Goodman, 2 Q. B. 597; Tupper v. Foulkes, 9 C. B. n. s. 797, 803; 30 L. J. C. P. 214.

(*g*) Cherry v. Heming, 4 Exch. 637; 19 L. J. Ex. 63.

(*h*) Ball v. Dunsterville, 4 T. R. 313; R. v. Longnor, 4 B. & Ad. 647.

(*i*) Harrison v. Sykes, 7 T. R. 207.

(*k*) Perkins, s. 118; Com. Dig. Fait. A. 1.

be re-sealed and re-delivered, or the subsequent addition to the contract will be nugatory and invalid. (*l*) A bail bond which has been executed before the condition was filled up [* 21] has been held to be void ; (*m*) * and so has a deed of conveyance or transfer of shares, executed by the proprietor of such shares with the name of the purchaser in blank, and handed over by him to the plaintiff, by whom, on the sale of such shares to the defendant, the defendant's name was inserted as the purchaser. (*n*) And if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least, if that be done without the grantor's negligence), it is not the deed of the grantor. (*o*)

Delivery of Deeds.¹ — Until the sealed writing is delivered, it is not a deed. The delivery “ may be made by the party himself

¹ The practice so general throughout the United States of putting conveyances and mortgages on a public record, which becomes notice of their contents to subsequent purchasers and creditors, has given rise to a question probably little known in England: Whether registering an instrument under the recording laws involves or shows delivery? Some early decisions, taking for granted that a deed or mortgage is for the benefit of the grantee or mortgagee, were in the affirmative; and it was argued that even though the maker of the instrument had placed it upon record directly, yet his doing so might be treated as a delivery, and acceptance by the party of the second part might be presumed; that from the appearance of a deed upon the record the courts might assume that either the grantee had placed it there after formal delivery, or the grantor had delivered it to the register for the grantee's benefit. But cases occurred in which the presumption of benefit to the grantee from the conveyance was contrary to the fact; in which, owing to insertion of onerous conditions, the deed was injurious to him, and to treat it as delivered and accepted constructively would be unjust. For example, in States where the foreclosure laws allow treating a grantee who has assumed payment of a mortgage on the premises as the primary debtor, and rendering judgment against him personally for any deficiency, an owner of lands mortgaged for more than their market value might, if acceptance of a deed were always presumed from recording, cast his debt upon a stranger by executing a conveyance containing a recital that the mortgage was assumed by the grantee, and giving this in for registration without the grantee's knowledge. The register would, as matter of course, record the deed, the mortgagee's attorney would find it there when preparing papers to foreclose, and would make the grantee the chief defendant, and the grantee would be without remedy (except by action against the, probably insolvent, grantor) if the courts should insist on the presumption of acceptance as conclusive. Accordingly the most stringent form of the rule as now administered is that appearance of a deed or mortgage on the record raises a presumption of delivery and acceptance; but the

(*l*) *Weeks v. Maillardet*, 14 East, 570;
Sellin v. Price, L. R. 2 Exch. 189.

(*m*) *Powell v. Duff*, 3 Camp. 181.

(*n*) *Hibblewhite v. M'Morine*, 6 M. & W. 200.

(*o*) *Swan v. North British Australasian Land Co.*, 2 H. & C. 175.

that doth make the deed, or by any other, by his appointment or authority precedent, or assent or agreement subsequent"; (*p*)

presumption is a slight one, and may easily be repelled by evidence that the grantee or mortgagee never did in fact accept. *Tompkins v. Wheeler*, 16 Pet. 106; *Bulkley v. Buffington*, 5 McLean, 457; *Bensley v. Atwill*, 12 Cal. 231; *Wellborn v. Weaver*, 17 Ga. 267; *Warren v. Jacksonville*, 15 Ill. 236; *Masterson v. Cheek*, 23 Ill. 72; *Prettyman v. Goodrich*, ib. 141; *Rowell v. Hayden*, 40 Me. 582; *Jackson v. Cleveland*, 15 Mich. 94; *Ingraham v. Grigg*, 21 Miss. 22; *Boody v. Davis*, 20 N. H. 140; *Lawrence v. Farley*, 24 Hun, 293; *Jackson v. Perkins*, 2 Wend. 308; *Gilbert v. North American Fire Ins. Co.*, 23 Wend. 43; *Balbec v. Donaldson*, 2 Grant Cas. 459; *Chess v. Chess*, 1 Pa. 43; *Juvenal v. Jackson*, 1 Pa. St. 519; *Boardman v. Dean*, 34 Pa. St. 252; and see *Kille v. Ege*, 79 Pa. St. 15. And many of the decisions (those of the New England States seem particularly distinct) require the party claiming under the instrument to make some proof additional to its appearance on the record, that it was accepted by, or at least known to, the second party. *Carver v. Jackson*, 4 Pet. 1; *Wiggins v. Lusk*, 12 Ill. 132; *Oxnard v. Blake*, 45 Me. 602; *Berkshire Mut. Fire Ins. Co. v. Sturgis*, 13 Gray, 177; *Maynard v. Maynard*, 10 Mass. 456; *Harrison v. Phillips Academy*, 12 Mass. 455; *Hawkes v. Pike*, 105 Mass. 560; *Simson v. Thornton*, 3 Met. (Mass.) 275; *Parker v. Hill*, 8 Met. (Mass.) 447; *Barnes v. Hatch*, 3 N. H. 304; *Derry Bank v. Webster*, 44 N. H. 264; *Jackson v. Phipps*, 12 Johns. 418; *Rathbun v. Rathbun*, 6 Barb. 93; *Manhattan Life Ins. Co. v. Crawford*, 9 Abb. N. Cas. 365; *Day v. Mooney*, 6 Thomp. & C. 382; *Green v. Kornegay*, 4 Jones L. 66. Indeed in Kentucky it has been said that the presumption that a grantee will accept a deed because it is beneficial to him should never be carried so far as to be deemed equivalent to acceptance; acceptance is an essential fact, and unless the deed was corporally delivered to him or his authorized agent, proof of notice to him of the existence of the deed, with additional circumstances affording a reasonable presumption of his assent, is needful. *Commonwealth v. Jackson*, 10 Bush, 424; *Bell v. Farmers' Bank*, 11 Bush, 34; *s. p. Kingsbury v. Burnside*, 58 Ill. 310; *Krebaum v. Cordell*, 63 ib. 23. But in Alabama, where mortgagor acknowledged the mortgage and left it with the officer for registration, and it was registered, the delivery was held perfect, although the mortgagee never received the deed, and did not even know of its existence till after mortgagor's death. *Elsberry v. Boykin*, 65 Ala. 336. Often the distinguishing point is whether the party of the second part is claiming the benefit of the deed as delivered, or is repudiating it.

Other decisions upon delivery arising out of the practice of recording have been: If the grantor in a deed not delivered causes the same to be recorded, this is a sufficient delivery to enable the grantee to hold the land as against the grantor (*Kerr v. Birnie*, 25 Ark. 225), but not as against grantor's creditors (*Tharp v. Jarrell*, 66 Ind. 52).

Where a deed was executed with the usual formalities, acknowledged by the grantor before a judge, and put on record by the grantor's orders, but it was never delivered in fact, and it never was the grantor's intention to deliver it, except on a contingency that never happened, the deed was held void for want of delivery. *Jones v. Bush*, 4 Harr. (Del.) 1.

There is no rule that the time of filing a deed for record is *prima facie* the time of its delivery. *Bull v. Griswold*, 19 Ill. 631.

Where a deed has been obtained surreptitiously, and placed upon record by the

(*p*) *Shep. Touch.* 1 ch. 4, p. 57; *Tupper v. Foulkes*, 9 C. B. N. s. 797; 30 L. J. C. P. 214.

and it has been held that circumstances alone may be equivalent to a delivery, where no actual delivery can be proved. (*q*) Where the party to a deed was shown to have acted under the instrument, and to have done a variety of things confirmatory of the contract, Lord Mansfield held that the acts so done amounted to an acknowledgment of the delivery of the deed. (*r*) If the attesting witness is called and proves that he saw the defendant sign and seal the deed, and the plaintiff has possession of and produces the instrument, this is *prima facie* evidence of a delivery to the plaintiff; (*s*) and if a party sends forth a deed to the world as his deed, he will be estopped, as against a party who has acted on the faith of the representation, from showing that the deed is not his deed, and that he never executed it. The mere placing of a seal to a written contract will not make the

grantee, nothing short of ratification can give it vitality. *Hadlock v. Hadlock*, 22 Ill. 384.

The fact that the grantor delivered the deed to the recorder to be recorded, may tend to show fraud, but does not as a matter of law make the deed fraudulent, nor will it alone sustain a verdict of fraud. *Ward v. Wehman*, 27 Iowa, 279.

A deed delivered to the registering officer and subsequently accepted by the grantee will take effect from the time of the first delivery as against grantor, but not as against persons who acquired an interest before the date of the actual acceptance. *Bell v. Farmers' Bank*, 11 Bush, 34.

The delivery of a registered deed subsequent to the date of it may be proved whenever justice requires. *Fairbanks v. Metcalf*, 8 Mass. 230; *Harrison v. Phillips Academy*, 12 Mass. 456.

Possession of a deed by the grantee after it has been registered may be evidence of its delivery to him. *Maynard v. Maynard*, 10 Mass. 456; *Dawson v. Dawson*, Rice Ch. 243.

Where a registered deed purporting to have been delivered is lost, the presumption is that it was delivered; but this presumption is rebutted if the original deed is produced by the grantor, or if neither the grantor nor any person in his behalf was present at the attestation. *Powers v. Russell*, 13 Pick. 69.

The sending of a deed by the grantor to a stranger, or the deposit of it in a public office, is not a delivery to the grantee, unless it is so sent or deposited for his use. *Elsev v. Metcalf*, 1 Den. 323.

The delivery of a deed to the grantee after it is recorded by the recording officer under the direction of the grantor, is a good delivery. Also a deed duly executed and registered, afterwards declared in conversation by the donor to be intended to take full effect, is to be considered, on claim by the donees after the donor's death, as having been delivered. *Kemp v. Walker*, 16 Ohio, 118.

(*q*) *Doe v. Knight*, 5 B. & C. 689; (*r*) *Goodright v. Straphan*, Cowp. Thoroughgood's case, 9 Rep. 136 a.; 201; Co. Litt. 36; 2 Rolle, Abr. 26; *Tupper v. Foulkes*, 9 C. B. n. s. 797; Vin. Abr. Faits (K.). 30 L. J. C. P. 214; *Xenos v. Wickham*, (*s*) *Hall v. Bainbridge*, 12 Q. B. L. R. 2 H. L. 296; 36 L. J. C. P. 313. 699.

contract a deed. Thus, where an action of assumpsit had been brought upon certain articles of agreement, which, when produced, were not only signed by the parties, but had a seal opposite to each signature, but it appeared that the seals had been affixed to the document through ignorance and by mistake, it was held that the placing of a seal opposite to the name of the party, though evidence of a deed and one of the formalities belonging to it, was not to be taken as conclusive; and that if the parties did not mean to contract by deed, and had made use of the seal in ignorance of its legal effect, the contract would have the force and effect only of a common agreement. (*t*) A contract, bad * as a deed, may yet under certain cir- [* 22] cumstances, be good as a common agreement. (*u*)

Delivery as an Escrow.¹ — If a party signs and seals a deed, and places it in his drawer or on his table, and another person comes

¹ In order to a valid delivery in escrow, the instrument must first be fully completed. *Hicks v. Goode*, 12 Leigh, 479. In general, the delivery must be to a stranger to the transaction; at least a delivery to the grantee (or to his agent) on conditions will not operate as an escrow. *Foley v. Cowgill*, 5 Blackf. 18; *State v. Chrisman*, 2 Ind. 126; *Ward v. Lewis*, 4 Pick. 518; *Massmann v. Holscher*, 49 Mo. 87; *Black v. Shreve*, 13 N. J. Eq. 457; *Ordinary v. Thatcher*, 12 Vr. 403; *Worrall v. Munn*, 5 N. Y. 229; *Lloyd v. Giddings*, 7 Ohio, 375; *Miller v. Fletcher*, 27 Gratt. 403. That one of several obligors may hold their bond after execution by others, and in time deliver it with effect to bind all, is familiar; but a bond cannot be delivered as in escrow to one of several co-obligees. *Moss v. Riddle*, 5 Cranch, 351; *State v. Crisman*, 2 Ind. 126; *Madison, &c. Plank Road Co. v. Stevens*, 10 Ind. 1; *State Bank v. Evans*, 3 Green L. 155; *Blume v. Bowman*, 2 Ired. L. 338; *Perry v. Patterson*, 5 Humph. 133. A grantor may, however, send the deed by the grantee, as a mere messenger, to a stranger, to be held in escrow (*Jackson v. Sheldon*, 22 Me. 569; *Gilbert v. North American Fire Ins. Co.*, 23 Wend. 43); and delivery of sheriff's deed to attorney of purchaser, in escrow, has been sustained. *Jackson v. Catlin*, 2 Johns. 248, 3 Am. Dec. 415; *Robins v. Bellas*, 2 Watts, 359. And delivery in escrow to an officer of a corporation for the company has been sustained in some cases (*Southern Life Ins. Co. v. Cole*, 4 Fla. 359), though disallowed in others. *Wight v. Shelby R. R. Co.*, 16 B. Mon. 4.

Many cases show that no technical words or manner of delivery to the depository are necessary; the word "escrow" need not be used; if the parties manifest an intent that the instrument shall not be deemed a present deed, this is enough. *White v. Bailey*, 14 Conn. 271; *Jackson v. Sheldon*, 22 Me. 569; *Fairbanks v. Metcalf*, 8 Mass. 230; *Jackson v. Catlin*, 2 Johns. 248. If the parties meant to

(*t*) *Clement v. Gunhouse*, 5 Esp. 82, (*u*) *R. v. Ridgwell*, 9 D. & R. 678; 683; *Goodright v. Gregory*, Lofft. 339; *B. & C. 665*; *Hunter v. Parker*, 7 M. & Davidson v. Cooper, 11 M. & W. 778; *W. 322*.
13 M. & W. 343.

and takes it away, this is not a delivery; (*x*) and if it should appear that the contract was delivered conditionally, and not with

make final delivery to the grantee dependent on a condition, there is an escrow; if they meant only to provide for custody of the deed during a delay of delivery, there is not: their intent, gathered from the whole transaction, is the criterion. *Price v. Pittsburgh, &c. R. R. Co.*, 34 Ill. 13; *Foster v. Mansfield*, 3 Met. (Mass.) 412; *State Bank v. Evans*, 3 N. J. L. 155; *Clark v. Gifford*, 10 Wend. 310; *Braman v. Bingham*, 26 N. Y. 483; *Hathaway v. Payne*, 34 N. Y. 92, 107; *Prutsmann v. Baker*, 30 Wis. 644; 3 Washb. R. P. 301. The fact that the parties used the word "escrow" is not necessarily conclusive of the intent. *Stinson v. Anderson*, 96 Ill. 373; *James v. Vanderheyden*, 1 Paige, 385. The condition on which a deed is placed in escrow may be expressed in writing or rest in parol, or be partly in both. *Stanton v. Miller*, 58 N. Y. 192. A mere explanation or promise that something will be done does not constitute such a condition as is required. *Ordinary v. Thatcher*, 41 N. J. L. 403. Where the grantor retains control over the deed notwithstanding its being deposited with a third person for delivery by grantee on conditions, it is not a case of escrow. *Campbell v. Thomas*, 42 Wis. 437.

The depositary takes the instrument as agent of both parties, equally bound to withhold it from the grantee so long as the conditions are not performed, and to pass it to him when they are. The grantee cannot, by obtaining possession of the deed without performance, acquire any right available to himself; title cannot pass until the conditions are performed. *Carr v. Hoxie*, 5 Mas. 60; *Dyson v. Bradshaw*, 23 Cal. 528; *Jackson v. Sheldon*, 22 Me. 569; *Rhodes v. School District No. 14*, 30 Me. 110; *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66; *Abbott v. Alsdorf*, 19 Mich. 157; *Carter v. Mills*, 30 Mo. 432; *Townsend v. Hawkins*, 45 Mo. 286; *State Bank v. Evans*, 3 N. J. L. 155; *Jackson v. Rowland*, 6 Wend. 666; *Green v. Putnam*, 1 Barb. 500; *Stiles v. Brown*, 16 Vt. 563; *Smith v. South Royalton Bank*, 32 Vt. 341; *Everts v. Agnes*, 4 Wis. 343; and see *Carter v. McClintock*, 29 Mo. 464. Delivery made by the depositary without exacting performance of the condition does not render the instrument binding on the maker, at least not as towards the grantee (*Clements v. Hood*, 57 Ala. 459; *Weed Sewing-Machine Co. v. Jeudevine*, 39 Mich. 590; *Cotton v. Gregory*, 10 Neb. 125); nor can the grantee, according to the better opinion, thus gain power to transmit title to a *bona fide* purchaser. This, however, is a disputed question. See *Cotton v. Gregory*, 19 Am. L. Reg. N. S. 694, and note by M. D. Ewell, ib. 697. The necessity of a formal delivery by the depositary to the grantee is also controverted; according to some of the decisions, for some purposes the grantee's rights become fully fixed by performance of the condition. Whether the depositary is the judge of the sufficiency of grantee's performance, see *Hoig v. Adrian College*, 83 Ill. 267.

The effect of the depositary's delivery varies in different cases. Sometimes the deed takes effect from that date; sometimes from the date of performance of condition; sometimes even from original delivery to the depositary: according to the nature of the transaction and the just rights of the parties. No single rule on this subject can be derived from the cases. *Simpson v. McGlathery*, 52 Miss. 723, states the general doctrine on this subject thus: that a deed delivered in escrow does not take effect so as to divest or invest title until the second delivery; that the second delivery derives all its force from the first, of which it is the con-

(*x*) *Stanton v. Chamberlain*, Ow. 95; Cro. E. 122.

a view to its immediately taking effect as a deed, it is said to be delivered as an escrow, and an action cannot be maintained upon it until the condition has been performed. (y) But it does not follow that because a deed is to be executed in duplicate, its operation is suspended until both parts have been executed and interchanged. (z)

Deeds Inter Partes and Deeds Poll.—When a deed is made between several persons, it is called a deed *inter partes*, and also an indenture. When it is made by one person alone, it is called a deed poll. The indenture, or deed indented, takes its name from the ancient practice of writing as many copies or parts of the deed as there were parties, on one large sheet of parchment, in order that each party might have his part, and then cutting them off in a notched or wavy line, by which means they could at any time be compared together and identified. The deed poll was so called because the paper was polled or cut even, there being, as there was only one party to the deed, no necessity for a counter-part.

Contracts by Matter of Record are contracts acknowledged in open court before an officer of the court, and recorded in the presence of the party making the acknowledgment. A record thus made forms unimpeachable evidence of the contract, so that the contract is proved and established by the mere production of the record. Contracts by statutes merchant and statutes staple are contracts of record; and so also are the recognizances entered into by witnesses to enforce their attendance to give evidence at a trial.

Implied Contracts.⁹—With certain exceptions, referred to hereinafter, men are free to make such contracts as they may deem

summation; but when justice requires doing so, the second delivery will be made to relate back to the first. *s. p. Harkreader v. Clayton*, 56 Miss. 383; *Jackson v. Rowland*, 6 Wend. 666, 22 Am. Dec. 557. If the grantee refuses the depository's tender of the deed, the latter thereafter holds it as agent of both parties, according to their respective rights. *Adams v. Smilie*, 50 Vt. 1.

(y) *Parke, B., Bowker v. Burdekin*, B. & Ald. 440; *Murray v. Earl of Stair*, 11 M. & W. 147; *Gudgen v. Bessett*, 6 2 B. & C. 82; *Perk. sect. 137; Watkins v. Nash*, L. R. 20 Eq. 262.
 Ell. & Bl. 986; 26 L. J. Q. B. 36; *Furness v. Meek*, 27 L. J. Exch. 34; *Mil-* (z) *Kidner v. Keith*, 15 C. B. N. s.
lership v. Brookes, 5 H. & N. 797; 29 35.
 L. J. Exch. 369; *Johnson v. Baker*, 4

⁹ See Appendix, Vol. III.

to be for their own interests, and the law will ascertain and carry into effect the intention of the parties. This intention is generally expressed either by word of mouth or in writing; and in such cases the contract is called an express contract. The intention of the parties to any particular transaction may, [* 23] however, be gathered * from their acts and deeds, in connection with the surrounding circumstances, as well as from their words; and the law therefore implies, from the silent language of men's conduct and actions, contracts and promises as forcible and binding as those that are made by express words or through the medium of written memorials. If one man sends to the shop of another for food or clothing or articles of merchandise, or enters an inn and takes refreshment, the law implies a contract or promise from him to pay a reasonable sum for the articles and refreshments received, though nothing has been said or stipulated concerning price or payment. If one man is employed to work for another, the law raises an implied promise from the employer to pay the ordinary hire or reward for the work; and if a man borrow a horse, the law implies a promise from the borrower to the lender to feed the animal properly and sufficiently whilst it remains in his charge and possession. (a) It has been said that "The only difference between an express and an implied contract not under seal is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract by circumstances and the course of dealing between the parties. But whenever a contract is once proved, the consequences resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence." (b)

Division of Implied Contracts. — Implied contracts have sometimes been divided into inferred contracts, implied contracts properly so called, and constructive contracts. A contract is said to be inferred where the intention of the parties is not expressed in words, but may be gathered from their acts and from surrounding circumstances. In these cases the law enforces what it deems to have been the intention of the parties.

(a) *Handford v. Palmer*, 5 Moore, 423; *Morgan v. Ravey*, 6 H. & N. 265; 75.

(b) *Marzetti v. Williams*, 1 B. & Ad.

It not unfrequently happens that in the course of carrying out a contract, circumstances arise which have not been contemplated by the parties, and, consequently, where no intention has been expressed by them, or can be inferred from their acts. In such cases the law prescribes their respective rights and liabilities according to the dictates of justice, — that is, of general expediency, — and according to what, it is presumed, their intention would have been had they had those circumstances in their consideration when they made the contract. In a third class of cases the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right and the other should be subject to a liability, *similar to the rights [* 24] and liabilities which exist in certain cases of express contract. Thus if one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back ; for the law implies a promise from the wrongdoer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and, in fact, are not contracts at all.

SECTION II.

OF THE PARTIES TO CONTRACTS.

Parties entitled to enforce Simple Contracts.¹ — The interest in and right of action upon simple contracts is not confined to

¹ Of advertisements that a reward will be paid to any one who may render a designated service — arrest an offender, find lost property, furnish information, or the like — it has been held that, as usually drawn, they embody a proposal, and that any person within the terms of the offer may accept it, and his rendering the service, if prompted by the offer, is an acceptance, and if done before the offer has been publicly withdrawn, entitles him to payment on the ground of contract performed. *Morrell v. Quarles*, 35 Ala. 544 ; *Ryer v. Stockwell*, 14 Cal. 134 ; *Bull v. Talcott*, 2 Root, 119 ; *Gilkey v. Bailey*, 2 Harring. 359 ; *First National Bank*

the parties to the contract; (*a*) but the person for whose use or for whose benefit a simple contract has been entered into may

v. Hart, 55 Ill. 45; *Stephens v. Brooks*, 2 Bush, 137; *Marking v. Needy*, 8 Bush, 22; *Freeman v. Boston*, 5 Met. (Mass.) 56; *Crawshaw v. Roxbury*, 7 Gray, 374; *Jenkins v. Kelren*, 12 Gray, 330; *Janvrin v. Exeter*, 48 N. H. 83; *Furman v. Parke*, 21 N. J. L. 310; *Cummings v. Gann*, 52 Pa. St. 484; *Briggs v. U. S.*, 15 Ct. of Cl. 48. An advertisement offering a reward is a general offer, and its acceptance by one who gives the information or returns the article desired, creates a valid contract on which he may maintain an action for the reward. *Pierson v. Morch*, 82 N. Y. 503. That he should give notice to the advertiser of his intention to accept and serve as desired, is not necessary. *Wilson v. McClure*, 50 Ill. 366; *Hanson v. Pike*, 16 Ind. 140. To entitle a person to a reward offered for recovery of lost property, he must show a rendering of services after a knowledge of and with view of obtaining the offered reward; finding and advertising the property without knowledge of the offer, do not entitle him to claim the reward, even though they bring the thing found back to the owner. *Howland v. Lounds*, 57 N. Y. 604. The service must have been induced by the offer; at least it has been held that one who finds and restores lost property, gives information of an offender, &c., before he had knowledge that a reward was offered, cannot afterwards claim it. *Marvin v. Treat*, 37 Conn. 96; *Fitch v. Snedaker*, 38 N. Y. 248; *Stamper v. Temple*, 6 Humph. 113; but compare *Eagle v. Smith*, 4 Houst. 293; *Auditor v. Ballard*, 9 Bush, 572; *Russell v. Stewart*, 44 Vt. 170. An offer of a reward made by public advertisement merely, may be withdrawn in the same manner at any time before rights under it have accrued, and the fact that an individual who claims for services afterwards rendered under it did not know of the withdrawal when he rendered the service, is immaterial. *Shuey v. United States*, 92 U. S. 73; *Hanson v. Pike*, 16 Ind. 140. Whether an offer of this kind will be deemed revoked by lapse of a reasonable time without any service having been rendered under it, see *Matter of Kelly*, 39 Conn. 159; *Loring v. Boston*, 7 Met. (Mass.) 409. Persons not included in the terms of the offer cannot claim under it. *Means v. Hendershott*, 24 Iowa, 78; *City Bank v. Bangs*, 2 Edw. Ch. 95. For instances in which a claim for an advertised reward has been disputed on the ground that the claimant was not personally within the offer, or was under official obligations which bound him to render the service without reward, see *First National Bank v. Hart*, 55 Ill. 62; *Marking v. Needy*, 8 Bush, 22; *Pilee v. New Orleans*, 19 La. Ann. 274; *Pool v. Boston*, 5 Cush. 219; *Day v. Putnam Ins. Co.*, 16 Minn. 408; *Ex parte Gore*, 57 Miss. 251; *Gregg v. Pierce*, 53 Barb. 387; *City Bank v. Bangs*, 2 Edw. Ch. 95; *Stamper v. Temple*, 6 Humph. 113; *Davis v. Munson*, 43 Vt. 676; *Russell v. Stewart*, 44 Vt. 170. A valid claim cannot be founded on anything short of a substantial performance of what the advertisement desires. *Franklin v. Heiser*, 6 Blatchf. 426; *Williams v. United States*, 12 Ct. of Cl. 192; *Shuey v. United States*, 92 U. S. 73; *Burke v. Wells*, 50 Cal. 218; *Matter of Kelly*, 39 Conn. 159; *Cornelson v. Sun Mut. Ins. Co.*, 7 La. Ann. 345; *Kincaid v. Eaton*, 98 Mass. 139; *Furman v. Parke*, 21 N. J. L. 310; *Jones v. Phoenix Bank*, 8 N. Y. 228; *Commonwealth v. Edwards*, 10 Phila. 215; *Clanton v. Yound*, 11 Rich. 546. But see *Besse v. Dyer*, 9 Allen, 151; *Symmes v. Frazier*, 6 Mass. 344; *Brennan v. Haff*, 1 Hilt. 151, in which a performance disputed as only partial was held, under the circumstances, sufficient.

(*a*) *Carnegie v. Waugh*, 2 D. & R. 273; *Sutherland v. Pratt*, 13 L. J. Ex. 277; *Fitzmaurice v. Waugh*, 3 D. & R. 246.

enforce it, although he is no party to it, and although the contract is not, in express terms, made with him, but with another on his behalf, provided the consideration moves from him. In the ordinary transactions of commerce a man may sell or purchase in his own name, and yet it does not follow that the contract is exclusively his, but the transaction is open to explanation; and others who do not appear as parties to the contract are frequently disclosed, and step in to demand the benefit of it. (*b*)

Except in the case of bills of exchange, promissory notes, and bills of lading, parties cannot annex to their contracts the incident of negotiability and make them floating contracts payable to bearer. Where, therefore, the owner of a quantity of iron issued a note or undertaking in writing whereby he promised to deliver on and after a future day one thousand tons of iron to the party who should lodge the note or undertaking with him, it was held that the instrument was invalid; for the law does not give a floating right of action to any one into whose hands such a writing may come. (*c*) But if a man publishes an advertisement promising to give a sum of money to any person who shall give certain information, there is a contract with the person who performs the condition. (*d*) So if a man signs and circulates a promise or * agreement in writing [* 25] to pay a certain specified sum of money to any person who shall do a particular act, and the writing is delivered to a party who does the act on the faith of the promise, such party is entitled to the money promised to be paid. Therefore, where the defendant, who was the master of a vessel, gave a written undertaking under his hand to pay £6 to any person who should advance to a sailor that sum, provided the sailor should sail in the defendant's ship, then about to start, it was held that the plaintiff, who had advanced £6, partly in money and partly in goods, was entitled to recover that amount from the defendant. (*e*)

(*b*) *Per* Lord Ellenborough, *Bickerton v. Burrell*, 5 M. & S. 386.

(*c*) *Dixon v. Bovill*, 3 Macq. H. L. C. 16; *Williams v. Lake*, 2 Ell. & Ell. 349; 29 L. J. Q. B. 1.

(*d*) *Williams v. Carwardine*, 4 B. & Ad. 621.

(*e*) *M'Kune v. Joynson*, 5 C. B. N. S. 218; 28 L. J. C. P. 133. But see *Williams v. Lake*, *supra*.

Strangers to the Contract.¹ — If the act or service forming the cause or consideration for the promise to A be done or performed

¹ Numerous decisions have recognized the general doctrine, that in a proper case, where a promise (founded on a consideration) has been made for the benefit of a third person, either he or the immediate promisee may maintain an action upon it. 3 U. S. Dig. 524, § 2443, 2444. Parsons thinks "it would be safe to consider this a prevailing rule" in this country (1 Pars. Contr. 468; quoted with approval in *Hendrick v. Lindsay*, 93 U. S. 143, 149). There has been, however, great difference of opinion as to what are proper cases for the application of such rule, and many exceptions and limitations have been declared. The subject is involved in some confusion, and no single simple statement would be accepted throughout the country. Apparently, the tendency of modern cases is to allow suit by a stranger most readily where he is in some manner connected with the exchange of consents or the consideration; as where the immediate promisee was his agent, or has been made so by his ratification; where the promisee was indebted to him, and payment to him will discharge that debt; or the like. The rule, being partly one of procedure, is complicated in code States by enactments enabling the "real party in interest" in the cause of action, whatever it may be, to sue in his own name. For general discussions, see 1 Pars. Contr. 466-468; 3 Am. Dec. 305, note; 9 Am. Dec. 155, note; 12 Am. Dec. 693, note; 1 Story Contr. 524-527; Met. Contr. 205-211; 1 Throop Verb. Agree. 408, note *b*; article by H. O. Taylor, 15 Am. Law Rev. 231; article 11 Cent. L. J. 161.

Recent decisions are: According to the preponderance of American authority, a third person for whose benefit a simple contract has been entered into, for a valuable consideration moving from the promisee, may maintain an action against the promisor; or when sued in assumpsit by the promisor, he may plead, by way of set-off, the damages from the breach thereof. *Lehow v. Simonton*, 3 Col. 346; *Green v. Richardson*, 4 Col. 584.

If a vendor and purchaser agree that purchaser shall discharge part of price by paying a debt of seller to a third person, their promise, though not made directly to the creditor, enures to his benefit. He, after accepting it, may pursue any appropriate remedy for enforcing it, and his resorting in his own name to any such remedy, such as filing a bill to declare his debt a lien on the lands, is an acceptance. *Carver v. Eads*, 65 Ala. 190.

A promise by one to another that he will pay the indebtedness of the latter to a third person, may be enforced in equity by such third person, though he was not a party to the agreement. And after the acceptance of such promise by the creditor, he may maintain an action at law thereon. Until such acceptance by him, however, the parties to the agreement may rescind it. *Davis v. Calloway*, 30 Ind. 112.

Where A owes B, and B owes C, and all agree that A shall pay C what A owes B, C will be entitled to recover the same from A. *Karr v. Porter*, 4 Houst. 297.

A consideration moving from a promisee to a third person, and unknown to the promisor, will not support an action on the promise. *Ellis v. Clark*, 110 Mass. 389. See *Rogers v. Stone Co.*, 130 Mass. 581.

Upon an affirmative, unconditional promise, supported by a sufficient consideration, to pay to a third person a debt of the promisee, the latter may maintain an action against the promisor, immediately on a default in payment, to recover the amount agreed to be paid, and without waiting till the promisee has been him-

by some third party, and not by A himself, nor at his instance or by his procurement, A is said to be a stranger to the consideration. The fact that by such promise the promisor becomes liable to a direct action by the creditor, does not discharge his liability to an action by the promisee. *Meriam v. Pine City Lumber Co.*, 23 Minn. 314.

One for whose benefit a promise is made upon a sufficient consideration may sue upon it, though not privy to the contract. *Meyer v. Lowell*, 44 Mo. 328; *Beardslee v. Morgner*, 4 Mo. App. 139; *Barbaro v. Occidental Grove*, No. 16, ib. 429.

The right of a third person for whose benefit a promise is made, to sue upon it, is not affected by the question whether the promise is in writing. *Raum v. Kaltwasser*, 4 Mo. App. 573.

Where A and B contract, the fact that C had an interest therein by reason of an agreement between him and A, to which B was not a party, does not make C a proper party plaintiff in an action on the contract against B. *McKnight v. Watkins*, 6 Mo. App. 118.

An action will lie on a written promise made by the defendant to a third person for the benefit of the plaintiff, without any consideration moving from the plaintiff to the defendant. *Joslin v. N. J. Car Spring Co.*, 36 N. J. L. 141.

A promise for a valid consideration gives no right of action to a third person who is neither privy to the contract nor to the consideration, unless it was made for his benefit and he was the party intended to be benefited; the fact that a benefit would enure to him from performance is not sufficient. *Simson v. Brown*, 68 N. Y. 355.

When A, for a valuable consideration, agrees with B to pay his debt to C, C can enforce the contract against A. *Campbell v. Smith*, 71 N. Y. 26. So held of a mortgage debt. *Hand v. Kennedy*, 45 N. Y. Superior Ct. 385.

A third person may maintain an action in his own name upon a contract made expressly for his benefit, where his release would be a sufficient discharge to the promisor, but not where it would leave the promisor liable to an action by the other contracting party. *Kountz v. Holthouse*, 85 Pa. St. 235.

If a person makes an agreement with a railway company, by which he buys all its property and credits and assumes to pay all its debts, a creditor of the corporation may sue such purchaser directly for his demand. *Snell v. Ives*, 85 Ill. 279; but see to the contrary, *Mississippi Central R. R. Co. v. Southern R. R. Assoc.*, 7 Baxt. 595.

When one person, for a valuable consideration, engages with another (whether by simple contract or by covenant under seal) to do some act for the benefit of a third person, the latter may maintain an action against the promisor for breach of the engagement. After knowledge of and assent to such engagement by the person for whose benefit it is made, his right of action on it cannot be affected by a rescission of the agreement by the immediate parties thereto. *Bassett v. Hughes*, 43 Wis. 319.

A stranger cannot maintain an action on a contract unless the promisee was his agent or he was the trustee of the promisee. *McCarteney v. Wyoming Bank*, 1 Wy. T. 382.

See also *Shattuck v. Smith*, 5 Oreg. 125; *Hirschfelder v. Mitchell*, 54 Ala. 419; *Johnston v. United States*, 13 Ct. of Cl. 217; *Egan v. Thomson*, 57 How. Pr. 324; *Raum v. Kaltwasser*, 4 Mo. App. 573; *Loch v. Weis*, 64 Ind. 285; *National Sav. Bank v. Ward*, 100 U. S. 195; *McCarteney v. Wyoming Bank*, 1 Wy. T. 382.

In three recent cases attempt was made to extend the doctrine that a third

ation, and cannot enforce the contract; (*f*) but if the act or service has been rendered to B at the instance and request, and through the instrumentality and procurement of A, the consideration moves from A so as to enable him to enforce the promise. (*g*) Where the defendant promised the father of the plaintiff that if the plaintiff would marry the defendant's daughter, the defendant would pay to the plaintiff £20, and the marriage was celebrated, and the plaintiff claimed the £20, and it was objected that the promise was not made to him, but to his father, the court held that the action was properly brought by the plaintiff, who had performed the meritorious act forming the consideration for the promise. (*h*) But where, after the marriage, the fathers of the husband and wife agreed together that each should pay a sum of money to the husband, and that the latter should have full power to sue for the money, it was held, nevertheless, that

person for whose benefit a contract was made may enforce it, so as to enable individual inhabitants of a municipality to sue for breach of a contract made by the corporation. Substantially the facts were, that a private corporation, organized to supply the inhabitants of a city with water, contracted with the municipal authorities to furnish water for the uses of the fire department. The water company failed to furnish the supply required by the contract, and, in consequence, the fire department was unable promptly to extinguish a fire which occurred. An individual owner of property burned then sued the company for his loss. The courts alike denied such right of action, substantially on the ground that there is no privity of contract between such an aqueduct company and individual citizens. The contract obligation of the company is toward the municipal corporation, which alone can take steps to enforce the agreement. The claim of an individual resident to the exertions of the fire department toward extinguishing a fire rests, like other benefits enjoyed under city government, on public duty between that government and the people. It is not founded on contract, and the fact that the city may have been embarrassed in discharging its public duty by breach of a contract between it and another person, does not enable the sufferer to lay hold of such breach and enforce it in his own name. *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; *Davis v. Clinton Water Works Co.*, 54 Iowa, 59; *Foster v. Lookout Water Co.*, 3 Lea, 42; and see 22 Alb. L. J. 124.

(*f*) *Price v. Easton*, 4 B. & Ad. 434; & E. 452; *Martyn v. Hind*, 1 Cowp. 437; 1 N. & M. 303; *Crow v. Rogers*, 1 Str. 1 Doug. 142.
592; *Bourne v. Mason*, 1 Vent. 6; 2 (*h*) *Provender v. Wood*, Het. 30; Keb. 457. *Agacio v. Forbes*, 14 Moo. P. C. 171,

(*g*) *Curtis v. Collingwood*, 1 Vent. 297; *Lampleigh v. Braithwaite*, 1 *post*, p. *43; and see *Garrett v. Handley*, 3 B. & C. 462; 5 D. & R. 319; 4 B. & C. 664; 7 D. & R. 144; *Thatcher v. England*, 3 C. B. 262.
Smith's L. C. 135, 5th ed.; *Hob.* 105; *Townsend v. Hunt*, Cro. Car. 480; *Denman, C. J., Eastwood v. Kenyon*, 11 Ad.

the husband, not being a party to the agreement, could not enforce it. (*i*)

If there is a benefit to the defendant and a loss to the plaintiff directly resulting from the defendant's promise in favor of the plaintiff, there is a sufficient cause or consideration moving from the plaintiff to enable the latter to maintain an action upon the promise. Where Sir Edward Poole being about to cut down £1,000 worth of timber on his estate for the purpose of portioning * his daughter Grisel, the eldest son and heir [* 26] promised Sir Edward that if he would not fell the timber, he, the son, would pay his sister Grisel £1,000, and Sir Edward, confiding in his son's promise, allowed the timber to stand, and after his death the land, with the timber growing thereon, descended to the son, who then refused to fulfil his promise, whereupon the daughter and her husband brought an action against him, it was held that the action was well brought, for the son had the benefit of having the timber, and the daughter had lost her portion by reason of the brother's promise. (*k*) So where Rookwood being about to charge his lands with £40 per annum to each of his younger sons for their lives, the eldest son desired him not to charge the land, and promised to pay the younger sons duly the £40, and Rookwood, confiding in this promise, neglected to make the provision he had intended for his younger children out of the land, and after his death the eldest son refused to fulfil his promise, whereupon the two younger sons brought an action for the recovery of the money, the whole court held clearly that the action was well brought, and that it was a good consideration; for the defendant's land would have been charged with the rents but for his promise to pay the money to the plaintiffs. (*l*) In these cases the consideration indirectly moves from the party in whose favor the promise is made.

It was formerly held that the near relationship of parent and child extended to the child an interest in a contract entered into

(*i*) *Tweddle v. Atkinson*, 1 B. & S. 393; 30 L. J. Q. B. 265.

(*k*) *Dutton v. Poole*, 2 Lev. 210; 1 Vent. 318, 334; *T. Jones*, 102; affirmed in error in the Exchequer Chamber, *T. Raym.* 392. "It is difficult to con-

ceive," said Lord Mansfield, "how a doubt could be entertained in the case of *Dutton v. Poole*." *Martyn v. Hind*, *supra*.

(*l*) *Rookwood's case*, Cro. Eliz. 164; and see *Story's Comm. on Eq. Jur.* s. 64.

by the parent in its behalf and for its benefit, that the parent might be considered as the mere agent of the child in whose behalf and for whose benefit the contract was made, and that the latter might consequently maintain an action upon it. (*m*) Thus where the defendant promised a physician that if he succeeded in effecting a particular cure, he, the defendant, would give a certain sum of money to the physician's daughter, and the daughter brought the action, it was adjudged maintainable; "for the nearness of the relation gives the daughter the benefit of the consideration performed by the father." (*n*) But these cases could not now be supported at law, (*o*) and in equity a third person cannot enforce a stipulation made by another in his favor, and for which

that other has given valuable consideration, with the [* 27] * view of benefitting such third person, unless his condition in life has been altered by and in consequence of the stipulation. (*p*) Where the uncle and guardian of an infant, at the request of the infant, delivered £12 to J. S. to educate the infant, and in consideration of this J. S. promised to educate the infant and to pay the infant £12 when he came of age, it was held that the latter was the proper party to maintain an action for the non-payment of the £12. (*q*) An action will not lie against a railway company, as carriers of passengers for hire, at the suit of a master, for a personal injury sustained through their negligence by his servant, whereby the master lost the benefit of the services of the servant; the contract out of which rose the duty to carry safely being a contract between the company and the servant. (*r*) So also where a master sent forward his servant by train with his portmanteau, and it was delivered by the servant and accepted by the company as part of the servant's luggage, nothing being said as to the ownership of the portmanteau, it was held that no action lay against the company by the master for the loss of his portmanteau, on the ground that the contract

(*m*) *Dutton v. Poole*, 2 Lev. 211; *Hardr.* 321; *Thomas v. —*, *Styles*, 461; *Bafeild v. Collard*, *Aleyn*, 1; *Rippon v. Norton*, *Cro. Eliz.* 849, 881.

(*n*) *Bourne v. Mason*, 1 *Ventr.* 6; *Levet v. Hawes*, *Cro. Eliz.* 619, 652; *Het.* 176; *Rainer v. Mortimer*, 1 *Brownl.* 40.

(*o*) *Tweddle v. Atkinson*, *ante*, p. *25.

(*p*) *Spence's Equit. Jur.* vol. 2, pp. 280-286.

(*q*) *Odham v. Bateman*, 1 *Rolle Abr.* 31, pl. 8.

(*r*) *Alton v. Midland Ry. Co.*, 19 *C. B. N. s.* 213; 34 *L. J. C. P.* 292.

was between the company and the servant. (*s*) And where a telegraph company negligently misseut a message containing an offer for a cargo of ice to the vendor, in consequence of which the vendor incurred expense, it was held that he could not sue the telegraph company, because their contract was with the sender of the message and not with the receiver, although, if the sale had been effected, the vendor would, by the course of the trade, have been bound to repay the sender the cost of the message. (*t*)

Parties to Contracts with Bankers, Warehousemen, and Wharfingers. — If money is sent to a banker for the payment of certain debts, the consideration for a promise by the banker to pay over the money, pursuant to the directions he has received, is said to move from the creditor whose particular debt is to be paid and who is the object of the remittance; it being considered that the debtor is the agent of the creditor, and that the money is paid indirectly to the banker by the latter. (*u*) But in all cases where money is sent to one person to be paid by him to another, to enable the person who is the object of the remittance to maintain *an action against the remittee to recover the [* 28] amount transmitted to him, there must be an express promise or assent on the part of the latter to pay over the money to the former, or to hold it to his use, inasmuch as the mandate is revocable so long as no such assent, promise, or engagement has been given or entered into. (*x*) When, however, the assent has been given and the attornment made, the order to pay the money, if founded upon a precedent debt or other good consideration, becomes irrevocable; (*y*) the creditor looks no longer to the

(*s*) *Becker v. The Great Eastern Ry. Co.*, L. R. 5 Q. B. 241. But it is difficult to understand why the plaintiff was not entitled to recover the value of the portmanteau, on the ground that it was his property.

(*t*) *Playford v. United Kingdom Telegraph Co.*, L. R. 4 Q. B. 706; 38 L. J. Q. B. 249.

(*u*) *Lilly v. Hays*, 5 Ad. & E. 548; *Moore v. Bushell*, 27 L. J. Ex. 3; *Noble v. Nat. Disct. Co.*, 5 H. & N. 228; 29 L. J. Ex. 210.

(*x*) *Williams v. Everett*, 14 East, 597;

Fisher v. Miller, 7 Moore, 537; *Baron v. Husband*, 4 B. & Ad. 611; *Howell v. Batt*, 5 B. & Ad. 504; 2 N. & M. 381; *Wedlake v. Hurley*, 1 C. & J. 83; *Grant v. Austen*, 3 Price, 58; *Brind v. Hampshire*, 1 M. & W. 373; *Hill v. Royds*, L. R. 8 Eq. 292.

(*y*) *Winter v. Foweracres*, 2 Roll. Rep. 39, 40; *Robertson v. Fauntleroy*, 8 Moore, 10; *Atkin v. Barwick*, 1 Str. 165; *Hodgson v. Anderson*, 3 B. & C. 842; 5 D. & R. 744; *Walker v. Rostron*, 9 M. & W. 411; *Griffin v. Weatherby*, L. R. 3 Q. B. 753.

security of his original debtor, but relies on the assent of the remittee, which cannot be retracted, and is entitled to maintain an action against him for the amount received. (z) But if the amount transmitted be a mere voluntary gift or donation founded upon no precedent consideration, debt, or duty, the authority may be revoked at any time before the money is actually paid over by the remittee, (a) just as money, when paid by mistake to an agent, and placed by him to the account of his principal, but not paid over, may be recovered back by the party who has inadvertently transmitted it. (b) Subject to these qualifications, some of the old cases in Rolle's Abridgment, where it has been held that if £20 be delivered to B to pay over to C, C can maintain an action against B to recover this money, or that when goods are given by A to B under an agreement that B shall pay £20 to C, that becomes a debt due to C, may still be considered good law. (c) Warehousemen, wharfingers, and bailees of goods, stand in the same situation as bankers and depositaries of money; and when they have accepted a delivery order presented to them by a purchaser, they become the bailees of the party mentioned in such order, and are liable to him upon their promise to hold the goods on his account and at his disposal. (d)

Parties entitled to enforce Contracts under Seal.¹ — As a contract under seal requires no consideration to support it, the com-

¹ The covenantee is the proper plaintiff in an action on a covenant under seal; a stranger is not allowed to sue on a contract under seal on the mere ground that it was made for his benefit. *Hendrick v. Lindsay*, 93 U. S. 143, 149; *Douglass v. Branch Bank*, 19 Ala. 659; *Moore v. House*, 64 Ill. 162; *Haskett v. Flint*, 5 Blackf. 69; *Vickery v. Walker, Smith*, 78; *Montague v. Smith*, 13 Mass. 396; *Robbins v. Ayres*, 10 Mo. 538; *Howe v. How*, 1 N. H. 49; *Smith v. Emery*, 12 N. J. L. 53; *Hornbeck v. Westbrook*, 9 Johns. 73; *Gardner v. Gardner*, 10 Johns. 47. But the above rule is not carried so far as to forbid that covenants running with land should be sued by subsequent purchasers of the land.

The authorities substantially agree that when one purchases real estate incumbered by a mortgage, and agrees to pay the mortgage debt as a part of the consideration of the deed, the promise may be enforced by the mortgagee. In such cases the purchaser merely agrees to pay his own debt to a third person, the mortgagee, and he, by an equitable subrogation, stands in the place of the promisee.

(z) *Best, C. J., Gibson v. Minet*, 9 Moore, 36.

(a) *Lyte v. Peny, Dyer*, 49, a, b, p. 7; *Taylor v. Lendey*, 9 East, 54.

(b) *Buller v. Harrison*, 2 Cowp. 565.

(c) *Starkey v. Mylne*, 1 R. Abr. p. 32, pl. 13; *Disborne v. Denabie*, ib. pp. 30,

31, Z, pl. 5.

(d) *Bryans v. Nix*, 4 M. & W. 791.

mon law regarded only the instrument itself; and whenever a deed was expressed to be made between certain persons named in the premises of the instrument, or described therein as the contracting parties, those persons only and their privies claiming * through them by blood, representation, or [* 29] otherwise, could take advantage of it by way of action. (e)

It mattered not that the deed was made for the exclusive benefit or use of other individuals named therein, and contained covenants with them for the performance of certain duties: if they had not been made parties to the contract, they could not sue thereon, although they might have sealed and delivered the deed in common with those who were formally described as the parties to the instrument. (f) And although the 8 & 9 Vict. c. 106, enacted that after the 1st of October, 1845, an immediate estate or interest, and the benefit of a condition or covenant respecting any tenements or hereditaments, might be taken, although the taker thereof was not named a party to the same indenture, (g) this enactment was held only to apply to covenants respecting any tenements or hereditaments; and, therefore, where a composition deed was expressed to be made between "the several persons whose names and seals are subscribed and affixed in the schedule hereunder written, being creditors executing these presents as parties of the first part" and other par-

The mortgagee may also sustain an action whenever the circumstances are such as to justify the conclusion that the promise was made for his benefit. Where, however, the conveyance in which the grantee assumes a prior mortgage is itself a mortgage, the grantee owes the grantor no debt which he can promise to pay to a prior mortgagee, and if he makes such a promise, it is ordinarily a mere agreement to advance money to pay the prior mortgage, or rather an agreement with the mortgagor to purchase it, and there is little room for the conclusion that the promise was made for the benefit of the prior mortgagee. *Garnsey v. Rogers*, 47 N. Y. 233, and *Arnauld v. Griggs*, 29 N. J. Eq. 482, show that such a promise contained in a mere mortgage imposes upon the promisor no absolute continuing obligation which can be enforced by the prior mortgagee; he, however, may acquire and enforce the rights of the mortgagor in the promise. *Bassett v. Bradley*, 48 Conn. 224. For breach of a bond by A and B to C, to take care of D as long as she shall live, C or his legal representatives, and not D, is the proper party to bring suit. *Sandusky v. Neal*, 2 Bradw. 624; compare *Scott v. People*, ib. 642.

(e) *Chesterfield and Midland Silkstone & C. 355; Lord Southampton v. Brown, Colliery Co. v. Hawkins*, 3 H. & C. 657; 6 B. & C. 718; *Metcalfe v. Rycroft*, 6 34 L. J. Ex. 121. M. & S. 75.

(f) *Gilby v. Copley*, 3 Lev. 138; (g) See the 7 & 8 Vict. c. 76, sect. 11, *Berkeley v. Hardy*, 8 D. & R. 102; 5 B. repealed by 8 & 9 Vict. c. 106, sect. 1.

ties, it was held that creditors who did not execute the deed were not parties to it, and could not take advantage of the covenants contained therein, although they were expressed to be made with the parties of the first part and all other creditors. (*h*) But where a similar deed was expressed to be made with all the creditors, it was held that all were parties, and could sue on the covenants which were expressed to be made with each creditor severally. (*i*) When a deed was not made reciprocal between parties of the one part and parties of the other part, but was expressed to be made generally "to all" in the nature of a deed poll, then, if any one or more persons contracted or covenanted therein with a stranger, the latter might bring an action upon the deed against the parties so covenanting and contracting, provided they had duly sealed and executed the instrument, as in the case of an ordinary bond or obligation, where "fifty persons may be bound to one who is no party to the instrument, and all are liable to an action at his suit." (*k*)

When there was no formal commencement to a deed describing who were the parties to it, and whose deed it was, it [* 30] was held * to be the deed of those who were named in the instrument as the contracting parties, and who put their seals to it. (*l*) But they must have been named or designated in the body of the deed; for no person could maintain an action upon a contract under seal unless he was named therein, either by his own name or by some acquired or adopted name, or was otherwise described therein; (*m*) and the contract or covenant must in express terms have been made with him. (*n*)

Trustee and Cestui que Trust. — It was a fixed rule of law that the action upon a contract under seal, whether such contract was a deed *inter partes* or a deed poll, must be brought by the party with whom the contract was in terms made, and not by the per-

(*h*) *Chesterfield and Midland Silkstone Colliery Co. v. Hawkins*, 3 H. & C. 677; 34 L. J. Ex. 121; *Gurrin v. Kopera*, 3 H. & C. 694; 34 L. J. Ex. 128.

(*i*) *Gresty v. Gibson*, 4 H. & C. 28; L. R. 1 Ex. 112; 35 L. J. Ex. 74; *Reeves v. Watts*, L. R. 1 Q. B. 412; 35 L. J. Q. B. 171; *McLaren v. Baxter*, L. R. 2 C. P. 559.

(*k*) *Cooker v. Child*, 2 Lev. 74.

(*l*) *Nurse v. Francon*, 1 Ld. Raym. 28.

(*m*) *Maughan v. Sharpe*, 17 C. B. N. S. 443; 34 L. J. C. P. 19.

(*n*) *Sund. Marine Ins. Co. v. Kearney*, 16 Q. B. 935; 20 L. J. Q. B. 421.

son on whose behalf or for whose benefit it had been made. (*o*) In those cases the party to whose use or for whose benefit the contract had been entered into had a remedy in equity against the person with whom it was expressed to be made. The Court of Chancery deemed the latter a trustee for the former, and would compel him to execute his trust according to the apparent intention of the contracting parties. Hence the one was technically said to have the legal and the other the equitable interest in the contract. When, however, no express promise or engagement was entered into with some person or persons in particular, the case was different. If, for example, a man by writing, sealed and delivered, acknowledged generally that he had received a particular sum of money to the use of A, this made him a debtor to A to the amount specified. (*p*) A bill or receipt under seal was couched in the following terms: "Received of A £40 to the use of B & C, equally to be divided between them, to be repaid at such time as shall be most to the profit of B & C;" and it was held that this was an engagement with B & C to pay the money to them whenever they required it, and that B & C might consequently maintain an action for the recovery of the £40. (*q*)

These distinctions have, however, become of less consequence since the passing of the Supreme Court of Judicature Act, 1873, by the operation of which the beneficial interests arising under deeds will be recognized in every court as amply as they were formerly in the courts of equity.

Covenantees who have omitted to execute the Deed. — It is not in general necessary that those who have been made parties to a deed * *inter partes* should execute the deed [* 31] to be enabled to sue thereon. (*r*) Neither need a grantee under a deed execute, provided he has been made a party to the deed; for the law presumes his assent to the grant in the absence of an express disclaimer. (*s*) Where real property, therefore, is conveyed to trustees, parties to a deed, it is

(*o*) *Offly v. Warde*, 1 Lev. 235; *Barford v. Stuckey*, 5 Moore, 23; 2 B. & B. 333.

(*p*) *Core v. Woddy*, *Dyer*, 23, a.

(*q*) *Shaw v. Sherewood*, Cro. Eliz. 729; *Sund. Marine Ins. Co. v. Kearney*, *supra*.

(*r*) *Rose v. Poulton*, 2 B. & Ad. 830.

(*s*) *Townson v. Tickell*, 3 B. & Ald.

31. The disclaimer of a grant of realty should be made by deed. *Fitz. Ab. Joint-Tenancy*, pl. 9.

not necessary for them to execute, as the legal estate forthwith vests in them, unless they disclaim the grant; and if one of the trustees renounces, the whole property vests in those who accept the trust. (*t*) When, however, the execution of the deed by one of the parties is necessary to create or transfer some estate or interest, the creation or transfer of which forms the foundation or consideration for the covenants and stipulations contained in the deed, the party neglecting to execute cannot then maintain an action upon the covenants. (*u*) Where tenant for life and remainder-man are parties to an indenture whereby they (so far as they legally can and may, according only to their respective estates and interest) demise their estate for a term of years, and the lessee enters into possession, the tenant for life may sue him for breach of covenant, although the indenture has not been executed by the remainder-man. (*x*)

Parties liable upon Simple Contracts.¹—A person who signs a promissory note or an undertaking on behalf of another, (*y*) or

¹ The rule has been deemed elementary that, in order to bind one as principal by a written contract negotiated and executed by an agent, the instrument must purport to be the contract of the principal, and be signed in the principal's name by the agent, though the particular form in which these things appear is not material. A written contract which, though negotiated by an agent, may yet be, so far as its terms show, his personal contract, and which he signs with his own name, adding only "agent, &c.," or the like, even though for the purpose of preventing an individual liability, binds him personally, and not the principal; the qualifying words operate only as a description of the person, a means of identifying the name subscribed. But modern decisions favor allowing an inquiry to whom the credit was really given, or who was considered the actual party, rather than blindly following the form. It is not always deemed indispensable that a simple contract, in order to bind the principal, should be executed formally in his name and as his act; but when the instrument fairly evinces that the person making it acts only as agent, and intends to bind the principal and not himself, this is often treated as sufficient. Fitch, Real Estate Agency, 94. A written contract, not under seal, is binding on the principal in whatever form made or executed, if the principal's name appear in it, and the intention to bind him be apparent. *Randall v. Snyder*, 1 Lans. 163. The practitioner should examine carefully the course of decision in his State. See U. S. Dig. *Principal and Agent*, § 854-916, 1013-1088; *ib. Bills and Notes*, II.; *Smith v. Morse*, 9 Wall. 76; *Sturdivant v. Hull*, 59 Me. 172; *Gregory v. Leigh*, 33 Tex. 813; *Tannatt v. Rocky Mountain Nat. Bank*, 1 Col. T. 278; *Merchants' Bank v. Hayes*, 14 N. Y. Supm. Ct. 530;

(*t*) *Small v. Marwood*, 9 B. & C. 300.

(*u*) *Antram v. Chace*, 15 East, 212; *Dover, in re*, 18 Jur. 52; *Morgan v. Pike*, 14 C. B. 473.

(*x*) *How v. Greek*, 3 H. & C. 391; 34 L. J. Ex. 4.

(*y*) *Iveson v. Conington*, 2 D. & R. 309; *In re Gee*, 10 Jur. 694; *Burrell v. Jones*, 3 B. & Ald. 47-51.

who is made a party to an agreement *inter partes*, and signs it in his own name in behalf of another, will himself be personally responsible for the fulfilment of the contract, unless it clearly appears that he executed it as agent only, and that it was not intended that he should be personally liable upon it. (z) Where the plaintiff agreed with two persons "to pave their streets in Putney," and they, "on behalf of the parish, agreed to pay him" therefor, it was held that, as the parish could not be sued upon such an undertaking, the work must have been taken to have been done upon the personal security and credit of the promisors, and that they were therefore personally liable upon their agreement. (a) So where the respective attorneys for the prosecutor and defendants, on an indictment against the same parish for not re-paving a road, entered into an agreement by which

Guernsey v. Cook, 117 Mass. 548; Chandler v. Coe, 54 N. H. 561; Hall v. Bradbury, 40 Conn. 32; Graham v. Campbell, 56 Ga. 258; Powers v. Briggs, 79 Ill. 493; Hays v. Crutcher, 54 Ind. 260; Trustees of Cahokia Schools v. Rantenberg, 88 Ill. 219; Mellen v. Moore, 68 Me. 390; Hayes v. Matthews, 63 Ind. 412; Ulam v. Boyd, 87 Pa. St. 477; Chamberlain v. Pacific Wool Growing Co., 54 Cal. 103; Bryson v. Lucas, 84 N. C. 680; Tilden v. Barnard, 43 Mich. 376; Stone v. Wood, 7 Cow. 453, 17 Am. Dec. 529; Andrews v. Estes, 11 Me. 267, 26 Am. Dec. 521, and ib. 524, note; Magill v. Hinsdale, 6 Conn. 464 a, 16 Am. Dec. 70; Garrison v. Combs, 7 J. J. Marsh. 84, 22 Am. Dec. 120; Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160; Pentz v. Stanton, 10 Wend. 271, 25 Am. Dec. 558, and ib. 562, note; also, 20 Am. Dec. 666, 670, notes; Harrison v. McClelland, 57 Ga. 531; Rittenhouse v. Ammerman, 64 Mo. 197; McFarlin v. Stinson, 56 Ga. 396; McClellan v. Reynolds, 49 Mo. 312; Smith v. Alexander, 31 Mo. 193; Musser v. Johnson, 42 Mo. 74; Means v. Swormstedt, 32 Ind. 87; Lacy v. Dubuque Lumber Co., 43 Iowa, 510; Towne v. Rice, 122 Mass. 67; Mattocks v. Young, 66 Me. 459; New Market Savings Bank v. Gillet, 100 Ill. 254, 7 Ill. App. 499.

Substantially the same doctrine applies, as several of the above citations show, to contracts made by an executor or administrator in the affairs of the estate, or by an officer in the concerns of his company. The rule has been relaxed in some cases, especially in reference to corporations, where there was proof that the other party to the note or contract knew at the time of receiving it that it was delivered with intent to bind the principal alone (Shuetze v. Bailey, 40 Mo. 69; Smith v. Alexander, 31 Mo. 193; Musser v. Johnson, 42 Mo. 74; McClellan v. Reynolds, 49 Mo. 312; Schaefer v. Bidwell, 9 Nev. 209); while in other cases where this was alleged, the parol evidence to prove it was ruled inadmissible, because tending to vary a writing. Tannatt v. Rocky Mountain Nat. Bank, 1 Col. T. 278; Sturdivant v. Hull, 59 Me. 172; Merchants' Bank v. Hayes, 14 N. Y. Supm. Ct. 530. Compare Purinton v. Ins. Co., 72 Me. 22; Simpson v. Garland, ib. 40.

(z) Cooke v. Wilson, 1 C. B. N. S. Gregory, 29 L. J. Q. B. 95; 30 ib. 164; Lennard v. Robinson, 5 Ell. & Bl. 36.
942; 27 L. J. Q. B. 49; Deslandes v. (a) Meriel v. Wymondsold, Hard. 205.

the attorney for the prosecutor agreed that the recognizances should be respited, and the * attorney for the defendants agreed, "on the part of the parish," to pay the costs, it was held that the agreement was personally binding upon the attorney for the defendants. (b) An undertaking by one man on behalf of another may be either the undertaking of an agent, or of a principal and sole contracting party who comes forward to secure, on his own credit and responsibility, some benefit and advantage for a friend (c); or it may be the undertaking and guarantee of a surety who binds himself for the performance of some act or duty by a third party who is to be primarily liable upon the contract.

One person may, as we have already seen, have the benefit of the performance of the consideration for a simple contract or promise, and another may be liable upon it as the really contracting party: "If A contracts with B to make a coat for C, A must pay for it, though C wears it." But if the plaintiff has made the party to whom the goods have been furnished his debtor, if, for instance, he describes him as such in his books or in letters, he can only treat the other as a surety. (d) Where the defendant gave a written undertaking to pay the directors of the Manchester Gas Works for "all the gas which may be consumed in the theatre during the time that it is occupied by my brother-in-law, Mr. Neville," it was held that he might be made liable as the primary and sole debtor in an action for goods sold and delivered. (e)

Where the managers of a particular undertaking, having a public or corporate or partnership fund at their disposal, or power to impose assessments or make calls, and create a fund to defray expenses, employ workmen and servants, they will be personally responsible for the payment of the parties they employ, if credit has been given to them and not to the fund at their disposal. But "whether any contract is made, or on what terms

(b) *Watson v. Murrell*, 1 C. & P. 307.

(c) *Redhead v. Cator*, 1 Stark. 14; *Hall v. Ashurst*, 1 Cr. & M. 714; *Downman v. Jones*, 14 L. J. Q. B. 223; *Harper v. Williams*, 4 Q. B. 235; *Johnson v. Ogilby*, 3 P. Wms. 277.

(d) *Austen v. Baker*, 12 Mod. 250;

Anderson v. Hayman, 1 H. Bl. 121; *Langdale v. Parry*, 2 D. & R. 37, 340.

(e) *Wood v. Benson*, C. & J. 94; 2 Trw. 93; *Edge v. Frost*, 4 D. & R. 245.

it is made, must depend upon the circumstances of each case. If a party merely speculates on the chance of being paid, taking the risk whether funds will be collected and appropriated to his demand or not, there is no contract." (*f*) If he is to be paid, provided the requisite funds are obtained, and not otherwise, there is a conditional contract, which becomes absolute as soon as funds have been received. (*g*)

*** Parties Liable upon Deeds.**¹—A person not made [*33] a party to a deed may render himself liable to be sued

¹ The principle of the text seems to have been favored in California (*In-goldsby v. Juan*, 12 Cal. 564; *Dentzel v. Waldie*, 30 Cal. 138); in Mississippi (*Armstrong v. Stowall*, 26 Miss. 275; *Stone v. Montgomery*, 35 Miss. 83, 107); in New Hampshire (*Elliot v. Sleeper*, 2 N. H. 525; *Binge v. Smith*, 27 N. H. 332; *Woodward v. Seaver*, 38 N. H. 29; and see *Gordon v. Haywood*, 2 N. H. 402); and in New York (*Mead v. Billings*, 10 Johns. 99). It will be noticed, however, that nearly all these were cases either of a wife's deed in which husband did not join, or of a husband's deed without his wife's execution; and the question they present may be no broader than whether one spouse may not be bound by signing and sealing the other's deed, although not named in it as a party. Decisions upon relinquishment of dower or marital rights may not afford a trustworthy rule where full joint ownership is involved.

The view that a person who is not mentioned in a deed and does not appear as a party is not bound by its contents merely because he signs and seals it, appears preferred in the Federal courts *Agricultural Bank v. Rice*, 4 How. 225; *Powell v. Monson, &c. Manuf. Co.*, 3 Mas. 347; *Hall v. Savage*, 4 Mas. 273; *Lane v. Dolick*, 6 McLean, 200; in Alabama *Harrison v. Simons*, 55 Ala. 510; in Indiana (*Cox v. Wells*, 7 Blackf. 410); in Maine (*Payne v. Parker*, 10 Me. 178, 25 Am. Dec. 221; *Frost v. Deering*, 21 Me. 156; *Stevens v. Owen*, 25 Me. 94; *Lothrop v. Foster*, 51 Me. 367; *Peabody v. Hewett*, 52 Me. 33, 50, where also it has been held that a grantor whose signature has at his request been affixed to the deed by another person, is bound on the principle of estoppel. *Lovejoy v. Richardson*, 68 Me. 386); in Maryland (*Hutchings v. Talbot*, 3 Har. & J. 378); in Massachusetts (*Lithgow v. Kavenagh*, 9 Mass. 161; *Catlin v. Ware*, ib. 218, 6 Am. Dec. 56; *Lufkin v. Curtis*, 13 Mass. 223; *Leavitt v. Lamprey*, 13 Pick. 382, 23 Am. Dec. 685; *Melvin v. Proprietors of Locks*, 16 Pick. 137; *Bruce v. Wood*, 1 Met. 542; *Harper v. Gilbert*, 5 Cush. 418; *Hubbard v. Knous*, 3 Gray, 367; *Greenough v. Turner*, 11 Gray, 334; *Wilds v. Van Voorhis*, 15 Gray, 144; compare *Dudley v. Sumner*, 5 Mass. 438; *Foster v. Dennison*, 9 Ohio St. 121); and in Ohio (*Smith v. Handy*, 16 Ohio, 191; *Purcell v. Goshorn*, 17 Ohio, 105). This opinion is persuasively stated by the Supreme Court of the U. S. in *Agricultural Bank v. Rice*, 4 How. 225. There, purchasers had bargained for a piece of land belonging to married women, the contract being signed by the husbands and the wives, who were described as parties to it. But they subsequently executed a warranty deed, setting forth that the husbands in right of their wives conveyed the premises, the

(*f*) *Landman v. Entwistle*, 7 Exch. 632; *Giles v. Smith*, 11 Jur. 334; *Alexander v. Worman*, 6 H. & N. 100; *Andrews v. Dally*, 4 Bing. 566.

(*g*) *Higgins v. Hopkins*, 3 Exch. 163; 18 L. J. Ex. 113.

thereon by sealing and delivering the deed; for one who is no party to a deed may covenant with another who is a party, and thereby be bound; he may oblige himself by the deed, if there be express words to it, and the deed be sealed by him. (*h*) A man may also be bound by the covenants of a deed in which he is described as a party, though he does not execute it, if he assents to it, and takes a benefit under it, and treats the contract as his deed. (*i*) If a party sends forth a deed to the world as his deed, he cannot be heard to say that the instrument so sent forth as his own, professed to be signed by his own name, and to be sealed with his seal, is not his deed. If he intended to have the benefit of the representation, he cannot reject the burden; he cannot be heard to say, against those who have dealt with him on the strength of the deed being his deed, that it is not his deed, that it was never executed by him, or that it was executed without his sanction or authority. (*k*) If, too, he sends forth a deed as a valid deed, and induces others to act upon the representation, he is estopped from afterwards setting up the invalidity of the instrument, and showing that it was a simple nullity. (*l*) Where property is assigned by deed to a trustee, who covenants with the assignor, the assignor has no equity to proceed against the *cestui que trust*. (*m*)

wives merely acknowledging the deed. The court held the deed inoperative as to the wives' title; saying: In the premises of this instrument it is stated to be the indenture of their respective husbands in right of their wives, of the one part, and of the grantees of the other part, — the husbands and the grantees being specifically named, — and the parties of the first part there grant and convey to the parties of the second part. The wives are not described as grantors, and they use no words to convey their interest. The deed is altogether an act of the husbands, and they alone convey. "Now in order to convey by grant, the party possessing the right must be the grantor, and use proper words to convey to the grantee; and merely signing and sealing and acknowledging an instrument in which another person is grantor, is not sufficient."

Where there are two grantors, and one of them acts as attorney in fact for the other, he must subscribe his name twice: once as such attorney in fact, and once in his own right; one signature and two seals is not a good execution. *Meagher v. Thompson*, 49 Cal. 189.

(*h*) *Holt, C. J., Salter v. Kidgley*,
Holt, 210; Carth. 76.

(*i*) *Webb v. Spicer*, 13 Q. B. 893; 18
L. J. Q. B. 142.

(*k*) *Ex parte Straffon*, 16 Jur. 440.

(*l*) *Sheff., Aslt., &c., Ry. Co. v. Wood-*
cock, 2 Rail. Cas. 522.

(*m*) *Pickering's Claim*, L. R. 6 Ch.
525.

Covenants in Feigned Names — Estoppel.² — Generally speaking, the name of the covenantor or obligor appears in the body of the deed; but there is a sufficient designation and description of the party to be charged if the name is written at the foot of the instrument. (*n*) A man may bind himself by deed either in his own name, or by some acquired or adopted name, title, or description. Where, therefore, the defendant described himself in a deed by the name of "Davis and Marsh," he was held estopped from showing that his name was Davis only. (*o*) So if a man executes a bond in the name of Thomas, he is estopped by the bond from pleading that his name is Joseph. If he is described as James in the body of the deed, and executes it in the name of John, by writing that name against the seal, and is sued in the name of John, and pleads the misnomer, the plaintiff may rely on the estoppel, and the deed is conclusive evidence of the adoption by the defendant of the names both of James and John. (*p*) If the defendant has not * sealed [* 34] and delivered the deed with his own hand, it must be made out that he is a party to it in point of law, by showing that the party who sealed and delivered the deed in his name was authorized so to do by a power of attorney or written authority under seal.

Covenants and Obligations by One Person on Behalf of Another. — If an individual in a private capacity, not acting on behalf of the Government, covenants in his own name for the act of another, he is personally bound by his covenant, although

² Parol evidence is admissible to prove that a grantor executed the deed by another than his true christian name, in order to uphold the instrument as the effective deed of him who, in fact, signed it. *Nixon v. Cobleigh*, 52 Ill. 387.

The signing of a deed by a married woman in her christian name only, was held sufficient where her name appeared in full along with that of her husband in the body of the instrument and in the acknowledgment. *Zann v. Haller*, 71 Ind. 136.

In a deed of land in trust, where the trust is passive and the title vests by the statute in the beneficiaries, to describe them by name is not necessary; hence mistake in their names may be shown and corrected by parol, or disregarded. *Sydnor v. Palmer*, 29 Wis. 226; see also *Staak v. Sigelkow*, 12 Wis. 239.

(*n*) *Nurse v. Frampton*, 1 Ld. Raym. 28; 1 Salk. 214; 4 Ed. 2, cited Cro. Eliz. 57. *Lind v. Hook*, Mod. Cas. 225, cited Cro. Eliz. 897 n. (a); *Janes v. Whitbread*, 11 C. B. 406; *Reeves v. Slater*, 7 B. & C. 489; *Williams v. Bryant*, 5 M. & W. 454.

(*o*) *Elliott v. Davis*, 2 B. & P. 339.

(*p*) *Gould v. Barnes*, 3 Taunt. 505;

he describes himself in the deed as covenanting "for and on the part and behalf" of such other person. But when upon the face of the contract it appears that the covenantor is an officer acting in a public capacity in discharge of his duty to the crown or the country, he is not personally liable for the fulfilment of the contract, unless he gives his own undertaking, and it plainly appears to have been the intention of the contracting parties that he should himself be responsible for the performance of the act covenanted to be done. (*q*)

Joint and Several Agreements and Promises.—Where a defendant, a surveyor of highways, had incurred legal expenses on behalf of a parish, which were objected to, and opposition threatened to his accounts before the vestry, and the defendant at the meeting of the vestry offered to pay £50 of those expenses if the opposition were withdrawn, and the plaintiff and the other vestrymen present accepted the offer and signed a minute to that effect, and withdrew the opposition, and suffered the accounts to be passed, and the plaintiff, who was appointed successor to the defendant in the office of surveyor, sued the defendant for the £50, it was held that he had no claim to the money, as the contract was with all the vestrymen present at the meeting, and not with the plaintiff alone. (*r*)

If there be a joint retainer and employment of another by divers persons to do one thing for the benefit of all, they have a joint legal interest in the fulfilment of the contract by the party employed, although they may have several beneficial interests, and be possessed of separate shares, in the subject-matter of the contract; but if there be a separate retainer by each, in respect of the separate share of each, then they have separate interests in the fulfilment of the contract. (*s*)

If, in consideration of certain services to be rendered [* 35] by the * promisees, a promise is made to pay them a sum of money, this is a joint promise in favor of all, in which all are jointly interested; and the pointing out the particular

(*q*) *Wake v. Harrop*, 30 L. J. Ex. 273; 6 H. & N. 768; 1 H. & C. 202; *Unwin v. Wolseley*, 1 T. R. 674; *Allen v. Waldegrave*, 2 Moore, 128.

(*r*) *Kilham v. Collier*, 21 L. J. Q. B. 65; *Lucas v. Beale*, 20 ib. C. P. 134.

(*s*) *Hatsall v. Griffith*, 2 Cr. & M. 679; *Hill v. Tucker*, 1 Taunt. 7; *Ivans v. Draper*, 1 Roll. Abr. 31, pl. 9.

share that each is to receive of the sum so promised to be paid will not create a severance of interest. But if one sum *in solido* is not to be paid in the first instance, and afterwards divided, but separate and independent payments are to be made to each, then their interests are separate. (*t*)

Of Joint and Separate Interests in Deeds. — If parties take a joint estate under a deed, and a covenant affecting the enjoyment of that estate is entered into with them and “each of them,” the covenant is a joint covenant. If, on the other hand, the covenantees have separate estates and interests, then a separate duty arises to each one in respect of their several estates. (*u*)

If a covenant to do a particular act be entered into with several persons generally, as “with A, B, and C,” they have all *prima facie* a joint interest in the performance of it. (*x*) If a covenant is entered into with divers persons to keep a certain sea-wall in repair, this is, *prima facie*, a joint covenant; but if it appears on the face of the deed that the covenantees are so many separate landowners, possessed of separate estates, the covenant shall be construed to be a several covenant, by reason of their several interests.

If any one of several partners or joint adventurers enters into a contract or stipulation with the rest, such as an engagement not to trade on his own account, or not to sell merchandise without the assent of the others, &c., this is a joint contract; for they have a joint interest in the performance of it, and the breach operates as a joint damage to all. A covenant with several persons for the payment to them of a sum of money is a joint covenant with all, in the performance of which they have a joint interest; and the pointing out of the share which each is to take of the entire amount will not create a separation of interests; (*y*) but if a covenant be made with ten persons to pay a distinct sum

(*t*) Thomas *v.* —, Styles, 461.

(*u*) Slingsby's case, 5 Co. 18 b; Windham's case, ib. 7 b; James *v.* Emery, 8 Taunt. 245; 2 Moore, 195; Foley *v.* Adenbrooke, 4 Q. B. 207; Hopkinson *v.* Lee, 6 ib. 964; Wakefield *v.* Brown, 9 ib. 209; Pugh *v.* Stringfield, 27 L. J. C. P. 34; Haddon *v.* Ayers, 28 L. J. Q. B. 105.

(*x*) Sorsbie *v.* Park, 12 M. & W. 156-158; Bradburne *v.* Botfield, 14 ib. 573; Keightley *v.* Watson, 3 Exch. 725; Wetherell *v.* Langston, 17 L. J. Ex. 341; 1 Exch. 634; Servante *v.* James, 10 B. & C. 410; 5 M. & R. 299.

(*y*) Lane *v.* Drinkwater, 1 C. M. & R. 599; Byrne *v.* Fitzhugh, ib. 613 n. (*a*); English *v.* Blundell, 8 C. & P. 332.

of money to each of them, a separate duty arises to each; and it is the same in contemplation of law as if a separate and distinct contract had been entered into with each one of the parties separately. (z)

[* 36] ***Rights of Tenants in Common.** — If two tenants in common make a lease, reserving one entire rent to themselves, they have a joint interest in the rent, although it is reserved to them “according to their several and respective rights and interests;” but if there are several demises, and a separate reservation of rent to each tenant in common, they have separate interests. (a) When an estate in land, with covenants annexed, comes to two persons as tenants in common, their interests are in certain cases joint or several at their election. (b) If after a joint demise by tenants in common, with a general reservation of one entire rent, one tenant in common dies, the rent is severable, and follows the separate reversions, so that the heir at law of the deceased tenant in common is entitled to one moiety of the rent, and may maintain an action against the surviving tenant in common for receiving more than his share. (c) A covenant to repair in a joint demise by tenants in common runs with the entire reversion; and all the tenants in common of the reversion at the time of the breach, or their representatives, are jointly interested in it. (d)

Rights of Joint Tenants. — If two joint tenants make a lease of their land, reserving rent to one of them, it shall enure to both in respect of the joint reversion; (e) and the same rule holds good with respect to parceners who have a unity of interest, title, and possession, and together constitute but one heir. (f)

Joint and Separate Interests in the Case of Implied Contracts and Promises. — In implied contracts and promises, if the consideration moves from several persons jointly, the law raises a corresponding implied promise in favor of all, in which all are jointly

(z) Withers v. Bircham, 3 B. & C. 254; Shaw v. Sherwood, Cro. Eliz. 729. Kitchen v. Buckley, 1 Lev. 109; Womersley v. Dally, 26 L. J. Ex. 219.

(a) Powis v. Smith, 5 B. & Ald. 850; Last v. Dinn, 28 L. J. Ex. 94; Wilkinson v. Hall, 1 Scott, 675. (c) Beer v. Beer, 12 C. B. 60. (d) Thompson v. Hakewill, 19 C. B. n. s. 713; 35 L. J. C. P.

(b) Midgeley v. Lovelace, Carth. 289; (e) Co. Litt. 214 a, 180 b. (f) Decharms v. Horwood, 4 M. & Sc. 400.

interested ; but if there be several separate considerations moving from the parties separately and individually, the law implies a separate promise in favor of each, and their interests are separate. (g) A carrier, being in want of assistance upon the road, engaged two persons separately to aid him with their horses. Each sent three horses, with a carter to attend them, and the six drew the wagon ; and they were directed to send in their *several* accounts. The two brought a joint action for the hire ; but it was held not to be maintainable, as they had no joint interest. (h) If several persons agree to make a joint purchase, and employ an agent to buy merchandise on their joint account, and the agent goes into the market and makes the purchase in his own name, and the * vendor neglects to fulfil the contract, the em- [* 37] ployers of the agent are jointly interested in the contract made by their agent ; (i) and if goods and chattels are deposited by several joint owners in the hands of a bailee, they are not claimable by one of them alone ; and money paid into a bank to the joint account of several persons cannot be drawn out by one of them alone ; but, if several joint owners of a sum of money allow one of them to deal with their money and place it in the hands of a banker to his separate account, the banker may treat that as a contract with the one individual dealing with him, and refuse to be accountable to the joint owners of the money.

If a sum of money *in solido* is advanced by several persons, the law raises an implied joint promise of repayment in favor of all ; but, if several sums be advanced separately by each, the law implies a corresponding separate promise in favor of each. (k) Two joint owners of a sum of money, travelling together on the highway, were robbed of the money ; and thereupon they brought a joint action against the hundred, when it was objected that they ought to have sued separately. But the court held that they were properly joined, because they were jointly entitled to the damages to be recovered. If, however, there had been several sums of money, the separate property of the parties robbed, then separate actions should have been brought. (l) A, B, and C,

(g) *Coleman v. Sherwin*, 1 Salk. 137 ; (k) *Osborne v. Harper*, 5 East, 225 ;
Story v. Richardson, 6 Bing. N. C. 129. *Driver v. Burton*, 17 Q. B. 989 ; 21 L.

(h) *Smith v. Hunt*, 2 Chit. 142. J. Q. B. 157.

(i) *Cothay v. Fennell*, 10 B. & C. 672. (l) *Winterstoke, &c., v. Dyer*, 370 a, pl. 59.

being assignees under a commission of bankruptcy, incurred legal expenses on account of the bankruptcy to the amount of £208. A and B each paid the sum of £104 in discharge of the solicitor's bill, and brought a joint action against C upon an implied promise for contribution, when it was held that they could not sue jointly, but must each bring a separate action, as the law would imply a separate promise in favor of each, in respect of the money which each had paid on account of C. (*m*) But although several persons may contribute severally in equal shares towards one entire amount, yet, if their several contributions are put together and advanced as one sum *in solido*, the implied promise of repayment is a joint promise to all in respect of the entire sum so advanced, and not a several promise to each in respect of their several contributions thereto. (*n*) If several persons contribute their several proportions of a sum of money which is to be paid under a special contract to which they are parties, and the money is advanced as a sum *in solido*, and the contract is afterwards abandoned or rescinded, the implied promise to refund the

[* 38] money arises in * favor of all. (*o*) In a statutory mortgage under the Conveyancing and Law of Property Act, 1881, the implied covenants are joint and several, unless the amount is expressed to be secured in distinct shares or sums. (*p*) And where in a mortgage or obligation the sum is expressed to be advanced by two or more persons out of money belonging to them on a joint account, the mortgage money due to them is deemed to belong to them on a joint account as between them and the mortgagor or obligor, and the receipt in writing of the survivor or his personal representative is a good discharge, (*q*) unless otherwise provided.

Of Joint and Several Liabilities ex contractu. — “Each party to a joint contract,” observes Parke, B., “is severally liable in one sense: *i. e.*, if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of

(*m*) *Brand v. Boulcot*, 3 B. & P. 235.

(*n*) *May v. May*, 1 C. & P. 44.

(*o*) *English v. Blundell*, 8 C. & P. 332.

(*p*) 44 & 45 Vict. c. 41, s. 28.

(*q*) s. 61.

the obligors.” (r) It may be laid down as a general rule that, wherever several persons agree to perform a particular act, they are bound jointly and not severally in the absence of express words creating a several liability. If two or more persons covenant generally for themselves, without any words of severance, or that they, or one of them, shall do a particular act, a joint charge is created. (s) If three are bound in a bond by these words: “We bind ourselves, and each of us jointly,” it is a joint obligation; for the word “jointly” makes the obligation joint, which the word “each” cannot make several. Any number of persons may bind themselves jointly for the performance of one entire duty, and so become sureties for one another for the performance of the thing contracted to be done. (t) If several persons sign a promissory note commencing, “We promise to pay,” &c., each is liable for the other, and all are liable for the full amount of the note. (u) There is no absolute rule of equity that a contract which is in terms joint, and would be so construed at law, is in equity joint and several. (x) Under the Conveyancing and Law of Property Act, 1881, a covenant, contract, bond, or obligation, under seal, made with two or more jointly to pay money or to make a conveyance, or to do any other act to them or for their benefit, implies an obligation to do the act to or for the benefit of the survivor or any other person to whom the right to sue devolves. (y)

* If two or more persons who have joined together in [* 39] a contract “covenant severally,” or become “severally bound,” it is (in the absence of express words implying a joint liability) the same as if each of the covenantors had executed a separate bond on the same parchment. (z) When the parties engage for the performance of distinct and several duties, mere words of plurality, such as “we bind ourselves,” will not make the contract joint. (a) Where two persons guaranteed the due

(r) *King v. Hoare*, 13 M. & W. 505; *Addison v. Gibson*, 10 Q. B. 106; 16 L. J. Q. B. 165; *Cross v. Williams*, 7 H. & N. 675; 31 L. J. Ex. 145.

(s) *Bacon's Abr. tit. Obligations*.

(t) 1 Saund. 291 b, n. 4.

(u) *Manley v. Boycott*, 2 Ell. & Bl. 46.

(x) *Kendal v. Hamilton*, 4 Ap. Cas. 504.

(y) 44 & 45 Vict. c. 41, s. 60. This extends to an implied covenant. It applies unless otherwise provided.

(z) *Newton v. Blunt*, 3 C. B. 681; *Beaumont v. Greathead*, 2 C. B. 494.

(a) *Collins v. Prosser*, 1 B & C. 682.

payment of an acceptance for £400 "in the proportion of £200 each," it was held that a several liability only was clearly expressed. (b)

If A lets land to B and C, and they covenant jointly and severally with the lessor to pay the rent, or the like, they are sureties for each other for the due performance of the contract; and it is as competent for each of them to covenant for the other as it is for a stranger to covenant for both, which is a common thing. (c) A covenant by two or more persons "for ourselves and each of us," or "for ourselves and every of us," is a joint and several covenant. (d) It has been held that, where the lessees in the first covenant of a lease "covenant jointly and severally in manner following," the joint and several liability extends to all the subsequent covenants, in the absence of any express words manifesting an intention to the contrary. (e) If several persons enter into a joint bond or promissory note, or other contract, and in the obligatory part make use of the pronoun *I* instead of *we*, they are jointly and severally bound. (f)

Where three persons agreed to refer certain disputes between them to arbitration, and "jointly and severally" promised and agreed to perform the award, and the arbitrator awarded that two of them should pay a sum of money to a third, and settled and directed the amount that was to be paid by each, it was held that each was liable for the whole amount awarded, as well as for his individual share. (g) If a party of friends dine together at a tavern, they are jointly and severally liable for the entire cost of the entertainment, in the absence of circumstances showing an express intention to the contrary. No certain rule of law, however, can be laid down to regulate the joint or [* 40] several liability * upon implied contracts, as the right of action entirely depends upon the varying facts of each particular case, and the inference a jury may be disposed to draw from them. In a case where provisions were furnished for

(b) *Fell v. Goslin*, 7 Exch. 185; 21 L. J. Ex. 145.

(c) *Enys v. Donnithorn*, 2 Bur. 119, 1 Wms. Saund. 154, n. 1.

(d) *May v. Woodward*, 1 Freem. 248; *Bolton v. Lee*, 2 Lev. 56.

(e) *Duke of Northumberland v. Errington*, 5 T. R. 522.

(f) *Sayer v. Chaytor*, 1 Lutw. 696; *Clerk v. Blackstock*, Holt, N. P. C. 474; *Hall v. Smith*, 1 B. & C. 409; *Ex parte Buckley*, 14 M. & W. 469.

(g) *Mansell v. Burreddge*, 7 T. R. 352.

the use of the officers of a regimental mess in camp, Lord Kenyon seems to have thought that the officers were severally liable only in respect of the articles used and consumed by each. (*h*)

Joint and several Purchases. — If two persons join in giving an order for an undivided parcel of goods, they are jointly liable for the price of them, unless it be proved that there was a separate contract with each. (*i*) If they employ an agent to make the purchase, and he purchases an undivided quantity, they are jointly and severally responsible for the price. (*k*) But if there be no agency in the matter, and the purchaser of an undivided parcel of goods subsequently makes a sub-contract with other parties for the taking by them of particular shares in his purchase, this subdivision of his beneficial interest under the original contract does not render the persons claiming under him jointly responsible with himself for the performance of the original contract. (*l*)

Contracts with Agents. Rights of the Principal. — If the agent who makes the contract contracts only in the name of the principal, intending to bind the latter, and not himself, by the contract, he will have no right of action upon it in his own name, unless he has himself an interest in the contract. Where certain tolls vested in a body of commissioners were let to the defendant, under a memorandum which stipulated that the rent was to be paid to the treasurer of the commissioners at his house in Ely, it was held that the contract was with the commissioners — to pay them through the medium of their officer — and that they alone could sustain an action upon it. (*m*)¹⁰ So where several persons rented a building to be used as a synagogue, and a treasurer was appointed annually by them, whose business it was to let seats and receive the rents for the use of the lessees, it was held, in an action brought by the treasurer for rent due in respect of the seats so let, that the contracts for the occupation of the seats, though in fact made with the treasurer, were, in point of law, made with the lessees who had the title to the

(*h*) *Forster v. Taylor*, 3 Campb. 49 ;
Rolle's Abr. 24, 31.

(*k*) *Gouthwaite v. Duckworth*, 12
East, 426.

(*i*) *Gibson v. Lupton*, 2 M. & Sc.
371.

(*l*) *Coope v. Eyre*, 1 H. Bl. 37.

(*m*) *Pigott v. Thompson*, 3 B. & P.
147; *Bowen v. Morris*, 2 Taunt. 374.

¹⁰ See Appendix, Vol. III.

synagogue, and that they, and not their servant, the treasurer, were the proper parties to maintain the action. (*n*)

Principals contracting as Agents.—If a party de-
[* 41] scribes himself, * on the face of a written contract, as agent, but does not disclose who his principal is, he may repudiate the agency, and claim the benefit of the contract as the principal, if he is in reality the principal. Although a man cannot, in strict propriety of speech, be agent to himself, yet in a contract of charter-party he may reserve to himself the right to fill either or both of those characters at his election; he may contract as agent of the freighter, whoever that freighter may turn out to be, and may then, if he pleases, adopt that character himself. (*p*)

Concealment of Agency. Rights of undisclosed Principals.—If there is nothing on the face of a written contract to indicate agency, but one of the contracting parties is in reality an agent contracting on behalf of an unknown and undisclosed principal, the latter may, in general, at any subsequent period, so long as the contract remains executory, come forward and claim the benefit of it; but he is, of course, bound by all the equities raised by his agent whilst dealing apparently as a principal, and can take such rights of action only as the latter possesses at the time that he, the principal, discloses himself. (*q*)¹¹ If, therefore, a factor entrusted with the possession of goods, sells them as his own with the authority of the true owner, and the purchaser deals with the factor as, and believes him to be, the principal in the transaction, in an action by the true owner for the price, the purchaser may avail himself of any set-off which has accrued to him against the factor while he believed the factor to be the principal. (*r*) This right of the principal to disclose his real character, and require the fulfilment of the contract with himself personally, exists even in the case of factors who have sold goods for the principal in their own names under a *del credere* commission,

(*n*) *Israel v. Simmons*, 2 Stark. 356; *Fish v. Kempton*, 7 C. B. 692; *Phelps v. Seignor and Wolmer's case*, Godb. Protheroe, 16 C. B. 370; 24 L. J. C. P. 360.

(*p*) *Schmaltz v. Avery*, 16 Q. B. 663; 467; *Dresser v. Norwood*, 14 C. B. N. S. 10 L. J. Q. B. 231. 574; 17 ib. 466.

(*q*) *Risbourg v. Bruckner*, 28 L. J. C. P. 94; *Carr v. Hinchcliff*, 4 B. & C. 547; (*r*) *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38.

provided the general balance of accounts between the principal and the factor is at the time in favor of the former. (s) And no rule or custom of the Stock Exchange can alter the law in this respect, or in any wise control the legal rights of the principal, although the principal was cognizant of the rule at the time he employed the broker. (t) Inasmuch, however, as the factor has a lien on the price of the goods in the hands of the buyer to the extent of the balance due to him from the principal on the general account, his commission on the sale, * mon- [* 42] eys advanced, &c., he may insist on payment from the buyer to himself in opposition to the principal, to the extent of the moneys so due to him from the latter.

In the case of a contract for the sale of land, specific performance has been decreed, although the purchaser was a mere nominal contractor, purchasing on behalf of, or in trust for, an unknown and undisclosed principal. (tt) As soon as a purchaser dealing with an unknown agent discovers that he is an agent, and receives an intimation from the principal that the latter intends to look to him for payment, he is not afterwards justified in settling with the agent. (u) The undisclosed principal who comes forward to adopt the contract must adopt it *in omnibus*; and if it is coupled with an agreement giving the defendant certain rights as against the agent, the principal must take the contract subject to those rights. (x)

In certain cases, however, where a contracting party professes to be a principal in the transaction, those who have contracted with him as a principal may refuse to fulfil the contract with any other person than the party with whom they have contracted as a principal. Where, for example, on the face of a charter-party for the hire of a vessel, one of two contracting parties was described as the owner of the vessel, and contracted with the other party in that character, it was held that a third person could not come forward and claim the benefit of the contract on

(s) *Bonzi v. Stewart*, 5 Sc. N. R. 1; *Scrimshire v. Alderton*, 2 Str. 1182; 152.
 (t) *Humphrey v. Lucas*, 2 C. & K. 152.
 (tt) *Hall v. Warren*, 9 Ves. 605.
 (u) *Cornish v. Abington*, 4 H. & N. 557; 28 L. J. Ex. 262.
 (x) *Ramazotti v. Bowring*, 7 C. B. N. s. 856; 29 L. J. C. P. 39.

the ground that he was himself the principal and owner of the vessel, and that the person described on the face of the contract as owner was not in truth the owner, but his agent. The inducement to the one party to enter into the contract may have been the character, credit, and substance of the other party described as the principal; and the former has a right, therefore, to decline performance of the contract with any other person. (*y*) So, in the case of a contract for the sale of land, if it appears that the agent treating for the land contracted as a principal in the transaction, and that the agency was designedly concealed because it was known that the vendor, from personal consideration, would not have sold the land to the undisclosed principal, and the vendor has consequently been deceived, the principal cannot come forward and enforce the contract so obtained.

So, where a merchant residing in England orders goods for a foreigner, the usage of trade is that the credit is given to the home agent, who has apparently contracted as the principal, and that the * foreigner is not bound by, and consequently cannot enforce, the contract. (*z*)

To entitle a person to enforce a contract, it must be shown that he himself made it, or that it was made on his behalf by an agent authorized to act for him at the time, or whose act has been subsequently ratified and adopted by him; and the person for whom the agent professes to act must be capable of being ascertained at the time. (*a*) A subsequent ratification, however, may be valid, although the principal was ignorant of the transaction until after it took place; and such a ratification may be made after an action has been commenced upon the contract in the name of the principal. (*b*)

Proof of Agency where the Contract is in Writing.¹—When the contract is in writing, and the agency is concealed, so that the agent appears on the face of the contract to be the contracting party, and no mention is made of any principal, it has been

¹ See *ante*, page * 31, American note.

(*y*) *Humble v. Hunter*, 12 Q. B. 310; 17 L. J. Q. B. 350.

(*a*) *Watson v. Swann*, 11 C. B. N. S. 756; 31 L. J. C. P. 210.

(*z*) *Die Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313; *Hutton v. Bullock*, L. R. 8 Q. B. 331; 9 Q. B. 572.

(*b*) *Ancona v. Marks*, 7 H. & N. 636; 31 L. J. Ex. 163.

contended that the admission of oral evidence, to show that the party with whom the contract is so made is in reality only an agent, infringes the well-known rule of law that the terms of a written contract cannot be varied or contradicted or added to by oral testimony, inasmuch as it is offered to introduce a party to the contract other than the one in whose name it is expressed to be made. But it has been held that the evidence amounts merely to an explanation of the real character of the transaction, and does not in any degree contradict or qualify the provisions and stipulations of the contract itself; and whilst "it is clear that parol evidence to vary a written contract cannot be received, yet that the parties contracted in the capacities of principals or agents may be explained." (*c*) In all cases where the character in which parties contract is not defined on the face of the writing, (*d*) "it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such, in making the contract, so as to give the benefit of the contract to the unnamed principal, and this whether the agreement be or be not expressed in writing." (*e*) But, if the consideration moves from one only of the partners in a firm, such partner may sue alone; (*f*) and upon * negotiable instruments, [* 44] such as bills of exchange and promissory notes, none but the parties mentioned by their name or firm can be admitted to sue. (*g*)

Purchases in the Name of one of several Joint Adventurers. —

If several persons send their cattle to a particular salesman, who sells them all to one individual, the only contract is the contract with the salesman alone, and each separate owner cannot bring an action against the purchaser for the price of his cattle. (*h*) But if a number of persons agree to be jointly interested in a

(*c*) *Humfrey v. Dale*, 26 L. J. Q. B. 137; 27 ib. 395.

(*d*) *Wilson v. Hart*, 1 Moore, 50; 7 Taunt. 295.

(*e*) *Parke, B., Higgins v. Senior*, 8 M. & W. 844; *Wake v. Harrop*, 30 L. J. Ex. 273; 6 H. & N. 768; 1 H. & C. 202; *Bateman v. Phillips*, 15 East, 272; *Garrett v. Handley*, 3 B. & C. 462; 4 B. & C. 664; 5 D. & R. 319; 7 D. & R.

144; *Ruppell v. Roberts*, 4 N. & M. 31; *Cooke v. Farquhar*, 17 L. J. Ex. 286; *Spurr v. Cass*, L. R. 5 Q. B. 656; 39 L. J. Q. B. 249.

(*f*) *Agacio v. Forbes*, 14 Moore, P. C. 171.

(*g*) *Beckham v. Drake*, 9 M. & W. 91.

(*h*) *Martin, B., Walshe v. Provan*, 8 Exch. 852.

purchase which is to be made by one of them separately in his own name, and the contract is made accordingly, all may join in suing for a breach of it. (*i*)

Recovery of the Money of the Principal paid away by the Agent. — If the money of the principal has been paid by the agent under circumstances which create a right to recover it back, as, for example, by mistake, or on the strength of a false or fraudulent representation, either the agent or the principal may bring an action for “money had and received,” and recover the money. (*k*) If the money of the principal is lent by the agent, the principal cannot maintain an action against the borrower to recover it back when the time of repayment arrives, unless it is proved that the principal was in reality the lender; for, if B lends money to A, and A makes a further loan of it to C, B has no right of action against C to recover it back. (*l*) Where a cargo belonging to several joint-owners was sold by their agent, and the money realized by the sale was paid into a bank by such agent in his own name, it was held that the bankers were accountable only to the agent from whom they had received the money. (*m*)

Rights of Principals upon Deeds made by Agents. — By an authority in writing under seal, one man may authorize another to enter into and to execute contracts under seal in his behalf; (*n*) but it depends upon the express terms of such contracts, and upon the mode in which the power given to the agent is exercised, whether the contract when made is the contract of the principal or of the agent, or whether it is the contract of [** 45*] neither * the one nor the other. (*o*) If the principal has, by a written authority sealed and delivered, authorized the agent to enter into and execute the deed, and the covenants contained in such deed are entered into with the principal

(*i*) *Cothay v. Fennell*, 10 B. & C. 671.

(*k*) 1 Roll. Abr. 38, pl. 12; *Drope v. Thaire*, Latch. 126; *Tracy v. Veal*, Cro. Jac. 223; *ib.* 224; *Duke of Norfolk v. Worthy*, 1 Campb. 337; *Stevenson v. Mortimer*, 2 Cowp. 805; *Smith v. Sleep*, 12 M. & W. 585; *Bastaple v. Poole*, 1 C. M. & R. 410; *Holt v. Ely*, 1 Ell. & Bl. 795; *Archer v. Bank of England*, 2 Doug. 637.

(*l*) *Sims v. Bond*, 5 B. & Ad. 393; *Calland v. Loyd*, 6 M. & W. 26; *Cooke v. Seeley*, 2 Exch. 746; 17 L. J. Ex. 288.

(*m*) *Sims v. Brittain*, 4 B. & Ad. 375; *Pinto v. Santos*, 5 Taunt. 447; *Martin, B.*, 8 Exch. 852.

(*n*) Com. Dig. C. 1, C. 5; *Horsley v. Rush*, cited 7 T. R. 209; *Harrison v. Jackson*, *ib.* 210.

(*o*) *Jung v. Phosphate of Lime Co.*, L. R. 3 C. P. 139.

in express terms, and the agent merely executes the deed in the name of the principal, (*p*) then the contract is the contract of the principal. If, on the other hand, the agent is made a party to the deed on behalf of the principal, and the covenants are entered into with the agent as such, then the contract is the contract of the agent.

Liability of Undisclosed Principals upon Simple Contracts. —

The extent and nature of the authority of an agent may be defined by writing, by oral instruction, or by the course of dealing between the parties. When the authority of an agent is general, it will be construed liberally, but according to the usual course of business in such matters. When the authority is given by parol, and is ambiguous, it is to be construed according to the course of trade in such matters; and, where it is unexpressed, it is to be ascertained by investigating the course of dealing pursued between the several parties to the transactions. Where an express authority is given, an authority is implied combined with it to do all acts which may be necessary for the purpose of effecting the object for which the express authority is given. A general parol authority may be enlarged by parol, or even an additional authority superadded to it by the course of employment of the parties known to and acquiesced in by them. For instance, a merchant may authorize a clerk to accept or indorse bills of exchange for him; but this will not of itself authorize his paying or receiving money due on such bills. But if, in the course of his employment, the clerk has, with the knowledge of the merchant, been allowed to do so, this will constitute a sufficient authority for that purpose, and will discharge the holders of the bill. An agent employed to negotiate and conclude contracts is not thereby authorized to pay or receive money which becomes due under such contracts; but the course of employment may justify the agent in so paying or receiving the money, if known to the principal, and not objected to by him. (*q*) If a principal employs an agent in a particular trade or business in which there are established usages regulating the powers and

(*p*) An agent who has an authority under seal to grant leases should merely execute the lease in the name of the principal. *Frontin v. Small*, 2 Raym. 1418; *Combe's case*, 9 Co. 76 b.; *M'Ardle v. The Irish Iodine Co.*, 15 Ir. Com. L. R. 146.

(*q*) *Pole v. Leask*, 28 Beav. 562.

duties of agents, the authority of the agent is regulated by such usages. (*r*) We have seen that oral evidence is admissible to show that a party contracting in writing was an agent, so as to give the benefit of the contract to an unnamed principal (*ante*, p. *43); it is in like manner admissible to fix the principal as the party really interested in the matter, and make him liable upon the contract. (*s*) Thus, where, by a bought note containing the terms of a contract for the sale of wool, and also by the invoice, Read appeared to be the buyer of the wool, oral evidence was admitted to show that Read was in reality the agent of Hart, and that Hart had directed the wool to be delivered at a particular spot, and had there received it; and Hart was accordingly made chargeable upon the contract, although he did not appear upon the face of it as a purchaser. (*t*) And in the case of oral agreements, although an agent contracts for the purchase of goods in his own name, and apparently on his own account, so as to make himself personally liable to the vendor for the payment of the price of them, yet the principal, when once discovered, is also liable; but, whether the agreement be oral or in writing, the principal cannot be charged if he has *bona fide* paid the agent at a time when the vendor still gave credit to the agent, and knew of no one else as principal. (*u*) If the vendor, at the time he strikes the bargain, knows that the party he is dealing with is an agent, but does not know who the principal is, and consequently debits the agent in the first instance, he may nevertheless, when he finds out the principal, claim payment of the latter, (*x*) provided he makes his election so to do within a reasonable time. (*y*) And the mere fact of filing an affidavit of proof against the estate of an insolvent agent after the undiscovered principal is known to the creditor is not a conclusive election by the creditor to treat the agent as

(*r*) *Sweeting v. Pearce*, 7 C. B. N. S. 449; 29 L. J. C. P. 265.

(*s*) *Higgins v. Senior*, 8 M. & W. 844; *Beckham v. Drake*, 9 M. & W. 96; 11 M. & W. 317; *Calder v. Dobell*, L. R. 6 C. P. 486; 40 L. J. C. P. 224.

(*t*) *Wilson v. Hart*, 7 Taunt. 295; 1 Moore, 50; *Humfrey v. Dale*, 27 L. J. Q. B. 390.

(*u*) *Armstrong v. Stokes*, L. R. 7 Q. B. 598; 41 L. J. Q. B. 253. See *Irvine v. Watson*, 5 Q. B. D. 414, C. A.

(*x*) *Kymer v. Suwercrupp*, 1 Campb. 109; *Thomson v. Davenport*, 9 B. & C. 78; *Thomas v. Edwards*, 2 M. & W. 216.

(*y*) *Smethurst v. Mitchell*, 1 El. & El. 623; 28 L. J. Q. B. 241.

his debtor. (z) But if, at the time the contract of sale is made, the vendor knows that the buyer, though dealing with him in his own name, and pledging his own credit, is in reality an agent, and knows also who the principal is, and, notwithstanding such knowledge, chooses to give credit to the agent, and make him his debtor, he cannot afterwards resort to the principal for payment. (a) And if an agent, having made a contract in his own name, has been sued on it to judgment, no second action is maintainable against the principal. (b) If an agent has borrowed * money for his principal, and the amount [* 47] has been received by the latter, he may be sued in an action of debt by the lender, although the lender, at the time he lent the money, supposed that the agent was the borrower. (c) The burden of proof of agency is on the person dealing with any one as an agent, through whom he seeks to charge another as principal; he must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it. (d)

Of the Agent's Authority to sign Writings for the Principal. —

Except for the purposes described in the first, second, and third sections of the statute of frauds, viz., for the purpose of creating leases, estates of freehold, or any uncertain interest in lands, tenements, or hereditaments, other than leases under three years, and except in the case of agents appointed by a corporation to bind the corporate body to certain contracts, a mere verbal authority to the agent will suffice to bind the principal; and, in the great majority of instances, an authority binding one man to the acts of another is raised by implication of law. (e) Any person who accredits another by employing him in any particular course of dealing is bound by what has been done by such agent in the course of his usual employment, and is responsible to third parties who have dealt with the agent in reliance upon the power and authority with which he was apparently clothed

(z) *Curtis v. Williamson*, L. R. 10 Q. B. 57.

(a) *Paterson v. Gandasequi*, 15 East, 62; *Thomson v. Davenport*, 9 B. & C. 88.

(b) *Priestley v. Fernie*, 3 H. & C. 977; 34 L. J. Ex. 173.

(c) *Samuel v. Green*, 10 Q. B. 262.

(d) *Pole v. Leask*, 33 L. J. Ch. 155; 28 Beav. 562.

(e) *Ridgway v. Wharton*, 6 H. L. C. 296; 27 L. J. Ch. 46.

by the principal. (*f*) If B has repeatedly signed A's name to policies of insurance, or to bills or notes, and A has subsequently recognized and sanctioned such signatures, the law will imply a general warrant from A to B, authorizing the latter to sign in A's name, and A will continue liable upon such contracts made by B in the name of A until the determination of the implied general authority has been publicly announced. (*g*) From repeated instances of employment, the law infers the existence of an implied general authority to the party employed to bind the employer within the limits of the previously recognized dealings. (*h*) But an agent employed specially to sign a contract for his principal upon one particular occasion is not impliedly clothed with any general authority to sign contracts for him. And a person whose agency has been strictly confined to bill transactions has no implied authority to give a guarantee. The

liability of the principal is always to be measured [* 48] * by the nature and extent of the previous employment of the agent; and it is the duty of parties dealing with a person who professes to be an agent, but is not notoriously so, to ascertain the nature and extent of his authority before they deal with him. If they neglect so to do, and it afterwards turns out that the agent had no authority, or has exceeded his authority, the principal will not be bound, and the only remedy they can have will be against the agent himself who has misled them. (*i*) The fact of a landlord employing a steward to let and manage his property does not clothe the steward with a general authority to grant leases, or to enter into agreements for leases, without the sanction of the landlord, or contrary to his express directions. (*k*) And the agent of an insurance company derives no authority, from the mere fact of his agency, to enter into a contract to grant a policy of insurance without the sanction of the directors. (*l*) An agent has, in general, no authority to borrow money on account of the principal, so as to render the

(*f*) *Whitehead v. Tuckett*, 13 East, 408; *Watkins v. Vince*, 2 Stark. 368; *Gilman v. Robinson*, ib. 226; *Hazard v. Treadwell*, 1 Str. 506.

Holt, C. J., Anon., 12 Mod. 564; *Attwood v. Munnings*, 7 B. & C. 278. (*i*) *Smout v. Ilbery*, 10 M. & W. 1; *Polhill v. Walter*, 3 B. & Ad. 114.

(*g*) *Neal v. Irving*, 1 Esp. 61; *Brockelbank v. Sugrue*, 5 C. & P. 21. (*k*) *Oollen v. Gardner*, 21 Beav. 542.

(*h*) *Todd v. Robinson*, R. & M. 217; (*l*) *Linford v. Provine*, Horse, &c. In. Co., 10 Jur. N. S. 1066.

latter responsible as the borrower, unless it can be proved that the principal has previously sanctioned such a course of dealing on the part of the agent, or has subsequently adopted and ratified the loan. (*m*) When an agent has been authorized to accept bills in the name of the principal, he may, it seems, under certain circumstances, select the hand of another person to carry the intention into effect without violating the rule "*delegatus non potest delegare*." (*n*)

Special Authority. — An agent entrusted with the performance of a particular duty has an implied authority to do all such incidental acts as are usual and necessary for the purpose of carrying the main object of the principal into effect.¹² Therefore, an agent employed to get a bill discounted, and not restricted as to the mode of doing it, may indorse it in the name of the principal to facilitate its being cashed, and bind the latter by such indorsement. But if he is expressly ordered by the principal not to put his name to the bill, and has not been employed by the principal as his general agent to discount and indorse bills, the principal cannot be made liable upon it. (*o*) And whenever one person is sought to be charged by the acceptance or indorsement of another, in consequence of the latter having, on previous occasions, drawn and accepted, or indorsed, bills in his name, it must be distinctly shown that he knew of, and had sanctioned, such previous acceptances or indorsements. (*p*) The customary mode of indorsement through * the medium [* 49] of an agent is by the agent's signing the name of the principal, adding under it "per procuration, A B," the agent writing his own name. The arrangement of the words is quite immaterial, provided they plainly express that the indorsement is made by one man on behalf of another — as A for B, B by A, or by procuration of A, &c.; but the name of the principal, whether the bill be drawn, accepted, or indorsed by the agent, must appear on the face of the bill, in order to express that the principal does the act through the medium of his agent; for if the agent merely signs his own name, the principal cannot be

(*m*) *Hawtayne v. Bourne*, 7 M. & W. 599.

(*o*) *Fenn v. Harrison*, 3 T. R. 757.

(*p*) *Davidson v. Stanley*, 3 Sc. N. R.

(*n*) *Lord v. Hall*, 8 C. B. 630; 19 L. J. 49; *Fearn v. Filica*, 7 M. & Gr. 523. C. P. 46.

¹² See Appendix, Vol. III.

made liable upon it. (*q*) When, however, a firm in partnership trade under the name of "A & Co.," and such partnership name appears on the face of the bill, all the members of the firm are liable upon it, although their individual names do not appear.

Contracts by Infant Agents.—The principal cannot rely upon any personal incapacity on the part of his agent to contract, as a defence against an action brought by those who have dealt with such agent; for the principal who has employed and accredited the agent cannot impugn his own act in the choice he has made. Therefore, although a person under age cannot contract so as to bind himself for anything beyond the necessities of life, he may nevertheless contract so as to bind his employer. (*r*) "If," observes Pothier, "a merchant has entrusted the management of his business to a minor, he is liable to the obligations arising from the contracts made by such minor, without having any right to oppose his want of age." (*s*)

Subsequent Ratification by the Principal.—Although no previous authority may have been given by the principal to the agent to enter into and sign the contract upon which the principal is sought to be charged, yet, if there be subsequent acts of assent or acquiescence on the part of the principal, he is as much liable upon the contract as if a previous authority had been duly given. "*Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur.*" (*t*) If a bill or note be signed without authority by A's servant or agent in the name of A, a subsequent promise by the latter to pay the bill is equivalent to a prior authority; (*u*) and if the proceeds of such a bill are applied to A's use or for his benefit, with his knowledge or concurrence, such application of the money obtained upon the bill will of itself

[* 50] * amount to a subsequent sanction and ratification of the act of the agent. (*x*)¹³ An adoption of the agency as to one part of a contract generally operates as an adoption of the whole transaction; for an act cannot be affirmed as to so much

(*q*) *Barlow v. Bishop*, East, 432; *Maclean v. Dunn*, 1 M. & P. 761; *Fitzmaurice v. Bayley*, 26 L. J. Q. B. 115.

(*r*) *Watkins v. Vince*, 2 Stark. 368.

(*u*) *Fenn v. Harrison*, 4 T. R. 177.

(*s*) Pothier (Obligations), No. 450; Dig. lib. 14, tit. 3, lex 7.

(*x*) *Bolton v. Hillersden*, 1 Ld. Raym. 224.

(*t*) *Soames v. Spencer*, 1 D. & R. 32;

as is beneficial, and rejected as to the residue. (y) "The principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act if done by his previous authority." (z) But in order to make it binding, the ratification must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances. (a) The subsequent ratification of the contract by the principal relates back to the time when it was made by the agent; and in those cases where, by the statute of frauds, the contract is required to be authenticated by writing, such ratification renders the agent an agent duly authorized to bind his principal under the provisions of the statute at the time the contract was entered into. (b) But ratification can only be by a person ascertained at the time of the act done, that is, by a person then in existence, either actually or in contemplation of law. (c) And, consequently, a company cannot ratify a contract purporting to have been made on their behalf before they existed as a company. (d)

Limitation of Authority.—If an agent exceeds his authority in cases where it is notorious that the authority of the agent is generally limited, the principal will not be liable beyond the extent of the authority given; and if the contract is indivisible, the principal will not be liable at all. Thus, where the defendant authorized a broker at Liverpool to underwrite marine policies for him, "not exceeding £100 by any one vessel," and the broker underwrote a policy for £150, and at Liverpool it is notorious

(y) *Hovil v. Pack*, 7 East, 166.

(z) *Tindal, C. J., Wilson v. Tummon*, 6 Sc. N. R. 904; *Berwick v. Horsfall*, 4 C. B. N. S. 450; 27 L. J. C. P. 193; *Fitzmaurice v. Bayley*, 8 Ell. & Bl. 868. As to the subsequent ratification of the acts of bailiffs and others, where the act was originally a trespass, see *Lewis v. Read*, 13 M. & W. 834.

(a) *Willes, J., Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43.

(b) 1 M. & P. 177. "Si je contracte au nom d'une personne qui ne m'avait point donnée de procuration, sa ratifica-

tion la fera pareillement réputer comme ayant contracté elle même par mon ministère, car la ratification équipolle à procuration." — *Poth. Traité des Obligations*, No. 75

(c) *Kelner v. Baxter*, L. R. 2 C. P. 174; 36 L. J. C. P. 94.

(d) *Melhado v. Porto Alegre Ry. Co.*, L. R. 9 C. P. 503; *In re Empress Engineering Co.*, 16 Ch. D. 125; but see *contra*, *Spiller v. Paris Skating Rink Co.*, 7 Ch. D. 368, *per Malins, V. C.*, following *Touche v. Met. Ry. Co.*, L. R. 6 Ch. 671.

that there is generally a limit fixed between the principal and the broker, though this limit is not disclosed to the public, it was held that the agent had no authority to underwrite for [* 51] £150, and that, the * contract being indivisible, the assured could recover nothing from the defendant in respect of the policy. (*e*)

Publication of Revocation of Authority. — In order to determine the liability of the principal to third parties who have dealt with the agent in ignorance of the determination of his authority, the principal must make the revocation as notorious to the world at large as the existence of the previous general authority and employment. (*f*) When a person has dealt with a tradesman on credit, it is not sufficient to give notice to the tradesman's servant that he means to pay ready money in future; it must be given to the tradesman himself, unless the servant is a foreman or manager having the general superintendence of the business. (*g*)

Misrepresentation and Fraudulent Concealment by Agents. — "If," observes Lord Abinger, "the clerk of a merchant or tradesman offers goods for sale to a customer, with a representation very material to their value, which representation his master knows to be false, but the clerk supposes to be true, whereupon the customer gives double the real value of the goods, the contract ought to be dealt with in the same way as if the master himself had made the representation." (*h*) If the representation forms part of the contract, the principal must take the contract in its entirety. "Wherever," observes Lord Kingsdown, "an agent makes a contract on behalf of his principal, whether with or without authority, the principal cannot approbate and reprobate the contract. He must adopt it altogether, or not at all; he cannot at the same time take the benefit which it confers and repudiate the obligation which it imposes." (*i*) "Whatever the

(*e*) *Baines v. Ewing*, L. R. 1 Ex. 320; 35 L. J. Ex. 194. *Herne v. Nicholls*, 1 Salk. 289; Ld. Ellenborough, *Crockford v. Winter*, 1

(*f*) *Pothier, Tr. des Ob. No. 449.*

(*g*) *Gratland v. Freeman*, 3 Esp. 85.

(*h*) 6 M. & W. 385; *Schneider v. Heath*, 3 Camp. 508; *Everett v. Desborough*, 3 M. & P. 204; *Holt, C. J.*,

P. 316; *Wright v. Crookes*, 1 Sc. N. R. 700; *Wheelton v. Hardisty*, 8 Ell. & Bl. 260.

(*i*) *Bristowe v. Whitmore*, 9 H. L. C. 391; 28 L. J. Ch. 801; and see the

previous authority of the agent," further observes Wilde, B., "whatever the principal's own innocence, he must, as it seems to me, adopt the whole contract, including the statements and representations which induced it, or repudiate the contract altogether. There are, no doubt, many frauds committed by agents which do not bind their principals; but I hold that the statements of the agent which are involved in the contract as its foundation or inducement are in law the statements of the principal." (*k*)

Liabilities of Principals on Contracts under Seal. —

If, in a * contract under seal, the principal is made to [* 52] covenant in his own name, and not in the name of his agent, and the deed is executed in the name of the principal, and the agent's authority to execute the deed is under seal, the principal is liable upon it just the same as if he had personally sealed and delivered the instrument; but, if the agent has covenanted in his own name on behalf of the principal, the action may be brought against the agent, who, in such a case, constitutes himself the trustee of the principal. (*l*) The principal is not, in any case, liable upon a deed, unless the authority of the agent to make and execute the deed is under seal; (*m*) but there is an exception in the case of two joint contractors, one of whom, it has been held, may execute a deed for himself and the other without an authority under seal, provided the execution be made "for himself and the other *in the presence* of that other." (*n*)

Warranties by Agents. — It has been held that a buyer who takes a warranty from a known agent or servant, professedly selling on behalf of his principal or master, takes the warranty at the risk of being able to prove that the agent had the principal's authority for giving the warranty, and that the law clothes the known servant entrusted to sell with no implied authority to warrant, unless such servant is the general agent of a tradesman employed in the trade or business of buying and selling; (*o*) but

judgment of Wilde, B., *Udell v. Atherton*, 7 H. & N. 172; 30 L. J. Ex. 176.
340. (*m*) *Steiglitz v. Egginton*, 1 Holt,

(*k*) *Wilde, B., Udell v. Atherton*, 7 141.

H. & N. 172; 7 Jur. N. s. 779.

(*l*) *Co. Litt.* 258 n.; *Anon., Moore*,

(*n*) *Ball v. Dunsterville*, 4 T. R. 313.

(*o*) *Brady v. Tod*, 9 C. B. N. s. 592;

although a vendor who employs an agent to sell gives the latter no authority to warrant, yet, if the agent does warrant, and thereby obtains a largely enhanced price, which never could have been procured if the warranty had not been given, it seems inconsistent with all ordinary principles of law and justice to allow the principal to retain the money and repudiate the warranty by which it was obtained. Finding that the agent had exceeded his authority by giving a warranty, the principal is doubtless entitled to repudiate the transaction altogether; but if he receives the money, and refuses to return it after he has had notice of the warranty, he surely ought to be held to have ratified and adopted the warranty. (*p*)

If a person puts goods into the custody of another whose common business it is to sell, he thereby confers upon him an authority to do all that is necessary and usual to be done to obtain a purchaser; (*q*) and, therefore, if the servant of a horse-dealer with express directions not to warrant does war-
[* 53] rant, the master is * bound, because the servant having a general authority to sell is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed. (*r*) Here the maxim *respondeat superior* applies; and the principal has his remedy against the agent for his misconduct. (*s*) Where a goldsmith's apprentice sold an ingot of gold and silver upon a special warranty that it was of the same value per ounce with an assay then shown, and it appeared that he had forged the assay, and that the ingot was made out of a lodger's plate, which he had stolen, it was held that the master was answerable for the fraud of the apprentice, (*t*) on the ground that the sale took place in the course of business in the master's shop. (*u*) Where the owners of a vessel, which had once been classed A 1 at Lloyd's, authorized

30 L. J. C. P. 223; *Udell v. Atherton*, ante, p. * 51, qualifying *Alexander v. Gibson*, 2 Campb. 555; *Helyear v. Hawke*, 5 Esp. 71.

(*v*) *Parke, B., Cornfoot v. Fowke*, 6 M. & W. 373; *Hern v. Nicholls*, ante, p. * 51; *Amory v. Delamirie*, 1 Str. 505.

(*g*) *Dingle v. Hare*, 7 C. B. N. s. 145; 29 L. J. C. P. 148.

(*r*) *Bayley, J., Pickering v. Busk*, 15 East, 45; *Howard v. Sheward*, L. R. 2 C. P. 148; 36 L. J. C. P. 42.

(*s*) *Ld. Kenyon, C. J., Fenn v. Harrison*, 3 T. R. 760.

(*t*) *Grammar v. Nixon*, 1 Str. 653.

(*u*) *Jervis, C. J., Coleman v. Riches*, 16 C. B. 115.

their agent, by power of attorney, to charter the vessel or to employ her as a general ship on any voyage, on such terms and in such manner in all respects as he should think proper, and generally to represent the owners in relation to her management or sale as fully as if the owners were personally present, and to do all things necessary for that purpose though the same were not especially mentioned, it was held that the agent had authority to enter into a charter-party with a warranty that the ship was at the time of the charter-party, A 1 at Lloyd's, though she was not so described in the power of attorney, and though she had ceased to be so classed when the power was given. (x)

If an agent employed by the indorsee of a bill to get it discounted warrants the bill to be a good bill, and receives cash for it on the strength of the warranty, and hands over the money to his principal, and the bill turns out to be a piece of worthless paper, the principal cannot retain the money. (y) It was his own fault, as Lord Holt has observed, to repose a trust in unworthy hands, and he ought not to be allowed to derive a profit from the misconduct of his own servant to the prejudice of an innocent purchaser. (z)

Representations by Agents not amounting to a Warranty. —

It is not every affirmation and representation which will amount to a warranty. If the fact concerning which the representation is made lies as much within the knowledge of the one party as the other, and the agent making the statement merely says what he * believes to be true, there is no warranty [* 54] on the part of the agent of the truth of what he states ; it is understood only, under such circumstances, that he does not wilfully state that which he knows to be false, either to mislead or to lull to sleep the vigilance of the other contracting party. And if there is, under such circumstances, a defect unknown to the party making the statement, and which the other party had as good means of discovering as the agent himself, the rule of *caveat emptor* applies. (a) A servant, serving in a shop, and

(x) *Routh v. Macmillan*, 33 L. J. 24 L. J. C. P. 125; *Cornfoot v. Fowke*, Ex. 38. 6 M. & W. 381.

(y) *Fenn v. Harrison*, 3 T. R. 177.

(z) *Coleman v. Riches*, 16 C. B. 120; (a) *Fuller v. Wilson*, *Wilson v. Fuller*, 3 Q. B. 58, 72; *Collins v. Evans*, 5 ib. 828.

demanding only the ordinary market-price of the wares he sells, may be asked this and that question as to the fitness of the different articles for particular purposes, and his answers to such queries would, in most instances, be considered the mere expression of his own individual judgment and opinion, given by way of guidance and advice to the purchaser, and not as warranties binding the principal to the truth of his representations.

Representations forming no part of the Contract with the Principal. — In order to charge the principal, it must not only be shown that the representation was made at the time the contract was entered into, but that it formed part of the foundation on which the contract rests. (*b*) Therefore, if an agent employed by his principal to find parties willing to contract, and then to send them to the principal to conclude the bargain with him, makes in the course of conversation with them statements and representations respecting the subject-matter of the contract which are not afterwards included in the contract entered into with the principal himself, the latter will not be bound by them. (*c*) Thus, where a house-agent, on going to show a house, was asked if there was anything objectionable about the house, to which he replied, "Nothing whatever," and, after this conversation, the parties differed about the rent, and the matter was then referred to the principal, and a contract for the letting and hiring of the house was subsequently entered into with the principal himself, which contract made no mention of the previous representation of the agent, it was held that the principal was not bound by the representation. (*d*)

Purchases by a Servant in the Name of his Master. — If a man sends his servant with ready money to buy goods, and the servant buys upon credit, the master is not chargeable. But if the servant "usually buys for the master upon tick, and the servant buys some things without the master's order, yet, if the master were trusted by the trader, he is liable." (*e*) "If [** 55*] goods," observes * Lord Ellenborough, "are taken up by the master, and the money given *afterwards* to the ser-

(*b*) *Helyear v. Hawke*, 5 Esp. 73.

(*c*) *Knight v. Barber*, 16 M. & W. 69.

(*d*) *Cornfoot v. Fowke*, 6 M. & W. 358.

(*e*) *Holt, C. J.*, *Show*. 95; *Southby v.*

Wiseman, 3 Keb. 625; *Nickson v. Brohan*, 10 Mod. 111; *Pearce v. Rogers*, 3 Esp. 214.

vant to pay, I am inclined to think the master liable, if the servant have not paid over the money; for he has given the servant authority to take up goods upon credit. It is therefore material to see when the money was given. If the servant were always in cash beforehand to pay for the goods, the master is not liable, as he never authorized him to pledge his credit; but if the servant were not so in cash, the master gave him a right to take up the goods on credit, and will be liable if the servant has not paid the plaintiff, though he may have received the money from the defendant, his master." (*f*) If a master sends forth his coachman into the world wearing his livery to hire horses which the master afterwards uses, knowing of whom they were hired, and yet not sending to ascertain if his credit had been pledged for them, an implied authority is given, and the master is bound to pay the hire, although he may have contracted with his coachman that the latter shall provide horses, and may have paid him a large salary for the purpose. (*g*) If the father of a family puts his children under the protection of servants, and lives himself at a distance from them, the servants have an implied authority to procure necessary medical advice in case of sudden illness or accident. (*h*) But if the plaintiff has shown a want of due caution, or has trusted the servant to an improper extent, the master will not be liable. (*i*)

Authority of Foremen and Managers.—A foreman entrusted with the general management of a trade or business has an implied general authority from his employer to enter into all such contracts as are usually and necessarily entered into in the ordinary conduct and management of the business. (*k*) Where the foreman of a saw-mill took an order from the plaintiff for a large quantity of Scotch fir staves, and agreed to have them ready for delivery within a particular period, it was held that his master was responsible for the non-fulfilment of the contract, although no particular authority from the master to the servant

(*f*) *Rusby v. Scarlett*, 5 Esp. 76; Pothier, Obl. No. 456; Arrêt du Journal des Audiences, tom. 5; *Miller v. Hamilton*, 5 C. & P. 433.

(*g*) *Rimell v. Sampayo*, 1 C. & P. 254.

(*h*) *Cooper v. Phillips*, 4 C. & P. 584.

(*i*) *Stubbing v. Heintz*, 1 Peake, 66.

(*k*) *Summers v. Solomon*, 26 L. J. Q. B. 301.

to enter into that contract could be proved. (*l*) If the acts of agency have been exercised in so open and public a manner that it may reasonably be inferred that the principal must have been cognizant of them, the principal will be liable, although no express authority can be proved. If the agent has published advertisements, and thereby induced parties to con-
[* 56] tract * with him, the principal will be bound by the publicity of the announcement, although no actual authority has been given. "It is a question between the principal and his agent; and the public has nothing to do with it." (*m*) Wherever the principal, by his conduct, has held out the agent to the parties dealing with him as having a general power to act in the premises, his acts bind the principal; and the liability of the latter upon the contract cannot be qualified by the existence of any private instructions which the agent may have exceeded. (*n*) Thus, where J, carrying on business at one place, and having a branch establishment at another, placed the latter under the management and superintendence of B, as his agent, and the branch business was carried on in the name of B & Co., but B had no authority to accept bills, and B nevertheless exceeded his authority by the acceptance of a bill of exchange, it was held that J was liable thereon, it not being in his power to divest his agent, by any secret reservation, of the powers incidental to the character of principal which he had empowered him to assume. (*o*)

Telegraph Clerks.¹—A telegraph clerk is only authorized to transmit a telegraphic message in the terms in which the sender

¹ As American telegraphs are not a branch of the postal service, but are operated by private corporations, it is proper to state more fully than is done in the text what has been decided as to exchange of proposal and acceptance by their means.

The early view regarded the companies as "common carriers,"—Scott & J. Tel. ch. 1 and 4,—and so they are styled in some even recent decisions. But several courts, looking at this question more closely, and it seems more correctly, have declared that the telegraphs do not "carry;" the nature of the undertaking is to

(*l*) Richardson v. Cartwright, 1 C. & L. J. Ex. 465; Edmunds v. Bushell, 35 K. 328. L. J. Q. B. 20; Pothier, Traité des Obligations, No. 79, 82.

(*m*) Runquist v. Ditchell, 3 Esp. 64. (*n*) Ellenborough, C. J., 15 East, 42; (*o*) Edmunds v. Bushell, L. R. 1 Q. B. Smethurst v. Taylor, 12 M. & W. 554; 97; 35 L. J. Q. B. 20. Smith v. M'Guire, 3 H. & N. 554; 27



delivers it; and, if he makes a mistake in the transmission of the message, the sender is not bound by it. (*p*).

render a service. The proprietors erect a wire with a signal apparatus at each end, and they engage that, when a message is given in at one end, the operator there shall make the necessary arrangements and signals for moving the apparatus at the other, and that the operator stationed there shall make known their meaning to the person addressed. *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; *Birney v. New York, &c. Tel. Co.*, 18 Md. 341; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; *Shields v. Washington, &c. Tel. Co.*, 1 Liv. L. Mag. 69; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; *Opinion of Hunt, J., in Leonard v. New York, &c. Tel. Co.*, 41 N. Y. 544, 571; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; *Breese v. United States Tel. Co.*, Allen Tel. Cas. 663; *De Rutte v. New York, &c. Tel. Co.*, 1 Daly, 547; 30 How. Pr. 403; *Aiken v. Telegraph Co.*, 5 S. C. 358; 2 Pars. Contr. (6th ed.) 257 b; 2 Am. L. Rev. 62; 12 West Jur. 65. The difference of view is chiefly important on the question whether the companies are liable as insurers for accuracy in transmission, or only for ordinary care in the performance of a service as agreed; but may have some bearing on the question of formation of contracts.

The question sometimes becomes important: Which is the original of a proposal, or an acceptance, — the despatch which was written and handed in to be sent, or the transcript which the operator at the other wrote out and delivered? For most purposes, the message as the sender wrote it is the original; in special cases, the writing delivered is deemed the original. See *Whilden v. Merchants', &c. Bank*, 64 Ala. 1; *Matteson v. Noyes*, 25 Ill. 591; *Barons v. Brown*, 25 Kan. 410; *Smith v. Easton*, 54 Md. 138; *Durkee v. Vermont Central R. R. Co.*, 29 Vt. 127. It has lately been held that one who sends by telegraph is bound by the transcript delivered; and that the receiver, where the propriety of his action taken under the message is in question, is entitled to put the transcript in evidence as the original. *Saveland v. Green*, 40 Wis. 431. See 14 Cent. L. J. 262.

One who receives an offer or an acceptance by telegraph has the right within limits to rely on the probability that the business is conducted with regularity, accuracy, and success; and, when proof has been made that a message was duly sent, the courts have sometimes acted on the presumption that it was delivered. In *Taylor v. The Robert Campbell*, 20 Mo. 254, Allen Tel. Cas. 24, the suit was against a steamboat for non-performance of an engagement by her master to transport a drove of hogs. The plaintiff proved that he telegraphed to the name of the boat asking for the transportation, and received on the next day, through the same office, a despatch promising to give it, signed in the name of the boat's master. On the question whether this was proof enough in the first instance, or ought he to show affirmatively that the master authorized the despatch, the court allowed the two despatches to be submitted to the jury, they to determine from all the circumstances whether the answer did not come from the master. See also *United States v. Babcock*, 3 Dill. 571; *Commonwealth v. Jeffries*, 7 Allen, 548; *Howley v. Whipple*, 48 N. H. 487; and as to messages sent by impostors, *Western Union Tel. Co. v. Meyer*, 61 Ala. 158; *Bank of California v. Western Union Tel. Co.*, 52 Cal. 280; *Elwood v. Western Union Tel. Co.*, Allen Tel. Cas. 594; 45 N. Y. 549.

As with respect to contracts made by mail, so as to those negotiated by telegraph: the general rule is that an acceptance takes effect and closes the contract from the time when it is sent. When one telegraphs an offer, he is understood to

Authority of Shipmasters. — Masters of ships have an implied general authority to bind the owners for necessary repairs done or supplies furnished to the vessel under their command; and by the word "necessary" is comprehended such as are fit and proper for the vessel upon her voyage, and such as a prudent owner himself, if present, might be expected to have ordered. (q) He

appoint the telegraph as a proper way of answering, and to take the risk that the answer, though promptly sent, may be delayed in transmission. To constitute an acceptance sufficient to complete a contract, it is necessary that there should be a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act; now the sending a letter or a telegram accepting a proposal is an overt act clearly manifesting the intent of the party sending it to close with the offer made, and the contract becomes complete upon the sending of such letter or despatch. *Trevor v. Wood*, 36 N. Y. 307, reversing 41 Barb. 255, Sedg. Dam. (5th ed.) 414, note. Where an offer by letter stipulated for an answer by telegraph, it was held that the telegram in answer was not effective unless received. *Lewis v. Browning*, 130 Mass. 173. To some extent, one making an offer by telegraph may be held to take the risk (as between him and the sender) of mistakes in transmission; and apparently one who receives an offer which has been changed on its way will be allowed in proper cases to hold the sender to the contract as embodied in the message actually received and the acceptance, leaving the sender to his remedy by action against the company for the mistake. See *Wann v. Western Union Tel. Co.*, 37 Mo. 472; *Washington, &c. Tel. Co. v. Hobson*, 15 Gratt. 122; *Dunning v. Roberts*, 35 Barb. 463; in which the parties seem to have treated the erroneous contract as obligatory. More usually controversies involving this point are disposed of on the theory that no contract was formed, for want of any meeting of minds upon the terms; and that the party injured by the failure of the negotiation must seek such damages as he can recover from the telegraph company, for causing it. In the noted case, for instance, in which buyer telegraphed to seller, "send two *hand* bouquets," but the operators delivered the message "send two *hundred* bouquets," the parties treated the buyer as liable only for the two bouquets he intended to order, and the seller sued the company for his loss sustained in cutting flowers for the other 198. *New York, &c. Tel. Co. v. Dryburg*, 35 Pa. St. 298. But *query* whether the seller could have held the buyer to his order as it was communicated to the seller, on the theory that sender, not receiver, takes the risk of errors, leaving the buyer to collect damages from the company? The cases do not afford a clear rule. Judge Redfield, in an article in 14 Am. Law Reg., 401 (1875), cites English decisions as holding that the sender of an offer by telegraph is not bound by errors in transmission; American, as holding that he is, because viewed as having made the telegraph his agent; and he thinks the latter rule more just and reasonable. See also 17 ib. 222; 227, note.

Whether telegrams are sufficiently full and explicit to be treated as embodying a complete contract, see *Deshon v. Fosdick*, 1 Woods, 286; *Calhoun v. Atchison*, 4 Bush, 261; *Smith v. Easton*, 54 Md. 138; *Hazard v. Day*, 14 Allen, 487; *Beach v. Raritan, &c. R. R. Co.*, 37 N. Y. 457; *Schonberg v. Cheney*, 6 Thomp. & C. 200; 3 Hun, 677; *Wells v. Milwaukee, &c. R. Co.*, 30 Wis. 605; *Albertson v. Ashton*, 102 Ill. 50.

(q) *Webster v. Seekamp*, 4 B. & Ald. *Stainbank v. Shepard*, 13 C. B. 441; 352; *Weston v. Wright*, 7 M. & W. 396; *Aaltjee Willemina*, L. R. 1 Adm. 107.

may also pledge the credit of the owners for such things as are absolutely necessary for the due prosecution of the voyage. (*r*) If it be necessary to pay harbor dues, or pilotage, or the like, in ready money, and the master has not been furnished with the necessary funds, he has an implied authority to borrow money, and to bind the owners by a contract for that purpose. But this authority does not extend to cases where the owner can himself personally interfere, as in a home port, or in a port in which he has beforehand appointed an agent who can do the thing required. (*s*) If the vessel is in a foreign port where the owner has no agent, or in an *English port, but at a distance from the [* 57] owner's residence, and provisions or other things require to be provided promptly, the occasion authorizes the master to pledge the credit of the owner, and make him liable upon the contract. But in all these cases the things must be absolutely necessary to enable the vessel duly to prosecute the voyage. (*t*) And the owners will not be bound if the money is borrowed, not upon their credit, but upon the private credit of the master himself. (*u*) The liability of the owner depends, not on his ownership of the vessel merely, but on his having authorized the master to bind him, either expressly, or by his having held out the master as his master, and having thereby induced the vendor to supply the necessaries on the credit of the owner. (*x*) The master has also, it seems, authority to settle a claim for demurrage made by him for the detention of the vessel at a foreign port. (*y*)

Limitation of the Authority of Shipmasters. — "The authority of the shipmaster is subject to several well-known limitations. He may make contracts for the hire of the ship, but cannot vary those which the shipowner has made." (*z*) He may take up money in foreign ports, and under certain circumstances at home, for necessary disbursements and for repairs, and bind the owners for repayment; but his authority is limited by the necessity of

(*r*) Robinson v. Lyall, 7 Price, 592.

(*s*) Gunn v. Roberts, L. R. 9 C. P.

331.

(*t*) As to home ports, see the 19 & 20 Vict. c. 97, s. 8; Arthur v. Barton, 6 M. & W. 143; Johns v. Simons, 3 Q. B. 425; Stonehouse v. Gent, ib. 431, n.; Poth. (Obl.) No. 448.

(*u*) Thacker v. Moates, 1 Mood. & Rob. 80.

(*x*) The Great Eastern, L. R. 2 Ad. & E. 88.

(*y*) Alexander v. Dowie, 25 L. J. Q. B. 281.

(*z*) Harris v. Carter, 3 Ell. & Bl. 559.

the case; and he cannot make them responsible for money not actually necessary for those purposes, though he may pretend that it is. (a) He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free. So with regard to goods put on board, he may sign a bill of lading, acknowledging the nature, quality, and condition of the goods; but his authority to give bills of lading is limited to such goods as have been actually put on board. A party, therefore, taking a bill of lading either originally or by indorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it, in order to charge the shipowner upon it; (b) nor can the master draw bills of lading making the freight payable otherwise than to the shipowner. (c) The shipmaster has no authority to sell any part of the ship or cargo, except in a case of absolute necessity, (d) or where the sale is warranted * by the law of the country in which it takes place; (e) nor has he any authority to hypothecate the ship or to borrow money upon the credit of the shipowners, after the work has been done, for the purpose of paying the debt due for it. (f) The master of a disabled ship has power under certain circumstances to forward the cargo by another ship; but he is not the agent of the owners of the cargo, so as to render them responsible for his act in so doing, where he has the opportunity of communicating with them or their agent, and neglects to avail himself of it. (g) Where the master of a ship contracts as such in a foreign port to carry goods for a foreigner, his authority to bind his owners is that conferred by the law of the country to which the ship belongs; and the flag of a ship is notice to all the world that his implied authority is limited by the law of that flag. (h)

(a) *Mackintosh v. Mitcheson*, 4 Exch. Ald. 621; *The Bonita*, 30 L. J. Adm. 175; *Edwards v. Havill*, 14 C. B. 107; 145; *The Gipsy*, 33 L. J. Adm. 195.
Organ v. Brodie, 10 Exch. 450. (c) *Cammell v. Sewell*, 5 H. & N.

(b) *Grant v. Norway*, 10 C. B. 687; 728; 29 L. J. Ex. 350.

20 L. J. C. P. 93; *Hubbersty v. Ward*, 8 Exch. 330; *Coleman v. Riches*, 16 C. 886; 20 L. J. Ex. 342.

B. 104; 24 L. J. C. P. 125. (g) *Gibbs v. Grey*, 2 H. & N. 22; 26

(c) *Reynolds v. Jex*, 34 L. J. Q. B. L. J. Ex. 286; *Duranty v. Hart*, 33 L. 251. J. Adm. 116.

(d) *Freeman v. E. I. Co.*, 5 B. & (h) *Lloyd v. Guibert*, 33 L. J. Q. B.

When shipowners have appointed a shipmaster and placed him in charge of the vessel, and have been in the habit of paying for stores and repairs ordered by such master, the general authority of the latter cannot be revoked or circumscribed by any private contract between the master and the owners, of which the persons dealing with the master are ignorant. Where, therefore, by articles of agreement between the owners and the master of a vessel, the master was to have and employ the vessel for his own sole benefit and advantage for eleven years, at a certain rent, and was at his own cost and charge to repair the vessel, tackle, rigging, &c., it was held that the plaintiffs, who had supplied the vessel with cables by order of the master, without any notice of the contract, were entitled to recover the price thereof from the owners. (*i*)

Where the ship is let to freight, and the charter-party or contract of affreightment operates as a demise or bailment of the ship to the charterer, so as to clothe him with the possession as well as the use of the vessel, and constitute him the temporary owner, the master becomes the agent of the charterer; and the latter, and not the registered owner, is then responsible for stores ordered for the use of the vessel by the master in the course of his employment by the charterer. (*k*) The shipowner, however, is *prima facie* liable for repairs and stores ordered for his vessel by * the master. If, therefore, on looking to the [* 59] registry, the defendant is found to be the legal owner, a *prima facie* liability is established against him. But the register is not conclusive; for the question is a pure question of contract and credit, which, like all other questions of goods sold or work done, must be decided by a jury upon consideration of all the circumstances.

If the charter-party operates, as it generally does, merely as a contract for the carriage of merchandise, the shipowner retaining the possession and control of the vessel through the medium of his servants and agents, he cannot repudiate the agency of the

241; *The Karnak*, L. R. 2 P. C. 505; (*k*) *Fraser v. Marsh*, 13 East, 238; 38 L. J. Adm. 57; but see *Greer v. Poole*, *Briggs v. Wilkinson*, 7 B. & C. 34; 9 5 Q. B. D. 272. D. & R. 871; *Reeve v. Davis*, 1 Ad. & .. (*i*) *Rich v. Coe*, 2 Cowp. 636; *Preston* E. 312.
v. *Tamplin*, 2 H. & N. 684.

master acting as such with his knowledge. Therefore, a shipowner who charters his vessel to another, but not so as to give up possession, is liable for a breach of the contract contained in a bill of lading signed by the master, such as injury to the goods by improper stowage, if at the time of shipment the shipper had no notice of the charter. (*l*) So where the defendant had never employed the plaintiff himself to do repairs to his vessel, but was the legal owner upon the register, and was in concurrent possession of the ship with a party to whom he professed to have sold it, and was fully aware that the shipmaster who was appointed by the latter was giving orders for repairs, and some of the defendant's servants were on board and in charge of the vessel, it was held that the defendant was responsible for repairs done to the ship by the plaintiff upon the order of the shipmaster. (*m*) Where, on the other hand, the shipowner had sold his shares in a vessel, and had ceased to be beneficially interested in the ship, and was not known as a part owner to the party doing the repairs until after the repairs had been ordered and done, but his name continued on the register, it was held that he was not liable for such repairs, unless it could be shown that the master who gave the order for them had an express or implied authority to bind him. (*n*) A part owner of a ship has no implied general authority to bind his co-owners for repairs. (*o*) Where a party is mortgagee of a ship only, taking merely the security of the ship without intending to incur any of the liabilities incident to ownership, the bare circumstance of his being entitled to the vessel, and to the earnings of the ship, will not make the master his agent so as to bind him in respect of contracts entered into by the master after the date of the

[* 60] * mortgage. (*p*) A mortgagee in possession of a ship is

(*l*) *The St. Cloud*, 1 B. & L. 4; *Sandeman v. Scurr*, L. R. 2 Q. R. 86; 36 L. J. Q. B. 58; *The Figlia Maggiore*, L. R. 2 A. & E. 106; 37 L. J. Adm. 52; *The Nepoter*, L. R. 2 Adm. 375; 38 L. J. Adm. 63.

(*m*) *Frost v. Oliver*, 2 Ell. & Bl. 315; 22 L. J. Q. B. 353.

(*n*) *Curling v. Robertson*, 8 Sc. N. R. 19; *Mitcheson v. Oliver*, 5 Ell. & Bl.

444; 25 L. J. Q. B. 39; and see *Hibbs v. Ross*, L. R. 1 Q. B. 534; 35 L. J. Q. B. 193.

(*o*) *Brodie v. Howard*, 17 C. B. 118; 25 L. J. C. P. 57.

(*p*) *Myers v. Willis*, 17 C. B. 103; 18 ib. 886; 25 L. J. C. P. 255; *Hackwood v. Lyall*, 17 C. B. 124; *Mackenzie v. Pooley*, 11 Exch. 638; 25 L. J. Ex. 124.

not liable for necessities supplied, unless the master in ordering them acted as his agent. (*q*)

A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action. The creditor has an election to sue either one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other. (*r*)

Authority of Ship's Husband.—A ship's husband who has authority from the owners to make a charter-party by which commission on freight, primage, and demurrage, is to be due to the charterers, has not power to bind the owners by making an agreement to cancel the charter-party and pay the charterers a sum of money in lieu of commission, although such agreement is for the benefit of the owners. (*s*)

Authority of Brokers.¹—One who employs a broker to transact business for him in a general market, as, for instance, upon

¹ It cannot be affirmed that the English doctrine, treating one who employs a stock-broker as impliedly agreeing to be bound by the usages of the board of brokers or local stock-market, has been unqualifiedly adopted in this country. The cases do not cover the subject in all its aspects, and they tend to question or limit the rule. When the question arises between persons who are both members of the same association, board, or exchange, there is good authority for the position that both are bound by the rules (not unlawful) of the society, and that their relative rights must be determined in the courts in view of those rules, as well as of the terms in which the parties have contracted and the implications the law would raise. This rests upon the principle that one who of his own accord becomes a member of an association assents to its laws and usages, and is bound by them where they do not conflict with law or public policy. *Hyde v. Woods*, 94 U. S. 523; *Re Dunkerson*, 4 Biss. 227; *Johnson v. La Variété*, 28 La. Ann. 421; *Palmyra v. Morton*, 25 Mo. 593; *White v. Brownell*, 3 Abb. Pr. n. s. 318; *Stevendores' Assoc. v. Walsh*, 2 Daly, 1; *Colket v. Ellis*, 10 Phila. 375; *Henry v. Jackson*, 37 Vt. 431; *Dickenson v. Chamber*, 29 Wis. 45; *Biddle, Stockb.* 50-53, ib. 66, 67, and cases cited. See, for limits of this rule, *Savannah Cotton Exchange v. State*, 54 Ga. 668; *State v. Union Merchants' Exchange*, 2 Mo. App. 96; *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501, and *Freeman's note*, ib. 507; *People v. Medical Society of Erie*, 24 Barb. 570; *Heath v. Gold Exchange*, 7 Abb. Pr. n. s. 251, 38 How. Pr. 168; *State v. Williams*, 75 N. C. 134; *Leech v. Harris*, 2 Brews. 571. Rules of an association do not generally affect strangers. *Samuels v. Central, &c. Exp. Co.*, *McMahon*, 214; *Flint v. Pierce*, 99 Mass. 63. The doctrine is easily extended to cases in which the contracting parties, though not technically members of a particular association, are both brokers, practically conversant with the usages of the market in which their dealings take place; and to

(*q*) *The Troubadour*, L. R. 1 Adm. 302.

(*r*) *Priestley v. Fernie*, 34 L. J. Ex. 173.

(*s*) *Thomas v. Lewis*, 4 Ex. D. 18.

the stock exchange, impliedly authorizes him to deal according to the general and known usages and customs of that market, although he may not himself be aware of their existence. But

cases in which the customer, although not a broker, employs the broker with full knowledge of the customs of the business. Wherever such facts show that the principal employing a broker to buy or sell entered into the arrangement with reference to local or special customs, he may well be held bound by them. But in most of the cases where the question has arisen between a stock-broker and a customer not a member of any board, and not acquainted with the peculiar course and usages of stock-brokerage, American courts have not generally considered the customer under any implied obligation to abide by the local or special rules urged against him. See the following cases : — Owners of Western railroad shares employed a Philadelphia firm of brokers to make sale of them, and the Philadelphia firm entrusted the shares to W, who was the Philadelphia agent of a New York firm, to be sold in New York. W sent the shares to his New York principals, and they sold them and collected the money; but before they had remitted it W failed, in debt to them on other business, and they then claimed to retain the amount of his indebtedness out of the proceeds of the shares, alleging that it was a custom among stock-brokers, when dealing with brokers in other cities, to embrace all transactions between the two firms in one account and remit or draw for the general balance; and that there was no privity between them and the general owner of the shares, but they had the right to treat them as the property of the broker through whom they received them. The Supreme Court of Pennsylvania sustained the ruling of the trial court, refusing to receive evidence of the custom alleged, saying that such a usage could not lawfully be extended to shares owned by a third person. “If,” said Williams, J., “there is a custom among stock-brokers, when dealing with others, to appropriate money belonging to the principal to the payment of his broker’s indebtedness, the sooner it is abolished the better; a custom so iniquitous can never obtain the force or sanction of law.” *Evans v. Waln*, 71 Pa. St. 69.

Where one who held shares as trustee pledged them for his private debt, the pledgee making no inquiry as to his authority, the pledgee afterwards, in a suit brought in behalf of the beneficiary, offered to show usages of the stock-market of Boston, where the dealing took place, for certificates of stock to be issued in the name of a trustee, when in fact there was no trust, and for such certificates to be bought and sold upon the simple indorsement of the nominal holder, without inquiry as to his authority or purpose. But the Supreme Court of Massachusetts held such evidence incompetent, on the grounds that the word “trustee” legally imports a trust, and that any usage of brokers to use it or disregard it as a fiction would be bad. *Shaw v. Spencer*, 100 Mass. 382. The same court, in a later case, in which a broker claimed the benefit of a local usage, that in filling orders for stock deliverable at buyer’s option within a specified period the broker might buy the stock for cash, or on short time, and carry it until the maturity of the contract, and might charge a brokerage besides commission for buying, as a compensation for carrying, pronounced the alleged usage contrary to common sense and good morals; for it assumed to authorize the broker to speculate for his own benefit. *Day v. Holmes*, 103 Mass. 306; see also *Pickering v. Demeritt*, 100 ib. 416; *Fisher v. Brown*, 104 ib. 261; *Commonwealth v. Cooper*, 130 ib. 285.

In New York, in cases where brokers carrying stock for a customer upon a margin have sold the stock for want of additional margin without giving him notice, and have claimed the right to do this under a usage of the Exchange, by which brokers there may sell out a customer’s stock summarily when his margin

when an usage or custom is intended to be relied upon, it ought to be clearly and distinctly proved to exist, and to be so general and notorious that persons dealing in the market could easily ascertain it, and must be presumed to be aware of it; and, in order to bind persons who were not aware of it, it must also appear to be a reasonable usage. (*t*)

is exhausted, the courts have pronounced against such claim, on the ground that the broker holds stock so purchased as a pledge, and that the customer has the legal right of a pledgee to have notice of the time and place of sale, or the benefit of some judicial proceeding to foreclose, of which he cannot be deprived by mere usage. *Gruman v. Smith*, 44 New York Superior Ct. 389; *Markham v. Jaudon*, 41 N. Y. 235. But compare *Nourse v. Prime*, 4 Johns. Ch. 490; 7 Johns. Ch. 69; *Robinson v. Norris*, 51 How. Pr. 442, 6 Hun, 233; and 21 Am. L. Reg. 171, 176.

New York brokers distributed circulars advising the purchase of "straddles" as a safe and profitable form of speculation, and offered to buy them for customers, under a guaranty of "no loss except commission." A person who received a circular, and had no particular knowledge of brokers' usages, gave an order, relying on the guaranty; but, when the brokers' account of the transaction was made, they brought the customer in debt, alleging that after buying the straddle they had sold shares short against it, in consequence of which the speculation had resulted disastrously, and claiming a right, under a usage of brokers, to employ a straddle in this way. The Court of Appeals held that the authority of the broker must be deduced from the correspondence and the rules of law applicable; that his only right as agent was to exercise the option involved in the straddle, in the customer's behalf; and that he could not justify himself under a local usage, unknown to the customer, in venturing upon a new and independent transaction. *Harris v. Tumbridge*, 83 N. Y. 92, 3 Abb. N. Cas. 293.

Where a broker charged a customer with more than he had actually spent, as "cost of telegrams," and claimed a right to do so under a custom of brokers to embrace in one message all directions needful in behalf of all the customers whose business was active at the moment, and to charge each customer seventy-five cents (the price of ten words), which is what his message must have cost if sent separately, though perhaps more than its share of a long message combining many orders, *held*, that a broker cannot sustain charges for disbursements not actually made, on the ground of custom, unless the custom was presumably known to the employer. *Marye v. Strouse*, 5 Fed. Reporter, 483.

Too many of the decisions involve the ground that the particular custom alleged was contrary to law or public policy, or to the express contract proved, to allow of saying that the English rule holding the customer chargeable by mere implication with the usages of the market in which he orders his broker to deal, is repudiated; but as yet it finds but little support in American cases. The tendency of opinion in the courts seems to favor applying to these agencies the general principle that parties are bound by special or local usages only so far as they must presumably have had knowledge of them when contracting. Opinion of some recent text-writers favors adopting the English doctrine. *Dos Passos*, *Stockb. ch. vii. Usages of Stockbrokers*, p. 341; *Biddle*, *Stockb. ch. vi. p. 215*. See also *Lewis*, *Stocks*, ch. ii. p. 23; *Lawson*, *Usages*, 287, 288. As to a local usage to settle accounts in a manner which may under certain circumstances, but does not necessarily, involve usury, see *Hatch v. Douglas*, 48 Conn. 116.

(*t*) *Grissell v. Bristowe*, L. R. 3 C. P. 112; 38 L. J. C. P. 10.

Ship Brokers. — If a broker, who is authorized to advertise a ship for a voyage, warrants by his advertisement that she shall sail with convoy, the shipowners are bound by the warranty, although in giving it the broker may have exceeded his authority. (*u*)

Authority of Counsel. — Counsel retained to conduct a cause is clothed with an apparent authority to do everything belonging to the conduct of it which in the exercise of his discretion he thinks best for the interest of his client; and if, acting within the limits of this apparent authority, he enters into an agreement with the counsel for the other side as to the cause, this agreement is binding on the client. But counsel has no right to manage a cause against the will of his client or to make a binding agreement as to it, if the other side is informed that this apparent general authority has been in fact limited. (*x*)

Authority of Solicitors.¹ — The force of a solicitor's retainer is at an end, and his power to bind his client by a compromise

¹ Of the implied authority of attorneys and counsel to contract for their clients in respect to the suit in which they are retained, Chief Justice Durfee, of Rhode Island, says (in *Whipple v. Whitman*, 26 Alb. L. J. 231, 13 R. I.) that the decisions are contradictory. In England the doctrine established by the later cases is that the attorney has power, by virtue of his retainer, to compromise the action in which he is retained, provided he acts *bona fide* and reasonably, and does not violate the positive instructions of his client, and that the compromise will bind the client, even if he does violate instructions, unless the violation is known to the adverse party. *Swinfen v. Swinfen*, 18 C. B. 485; *Swinfen v. Lord Chelmsford*, 5 H. & N. 890; *Chambers v. Mason*, 5 C. B. N. s. 59; *Chawn v. Parrot*, 14 C. B. N. s. 74; *Prestwich v. Poley*, 18 C. B. N. s. 806; *Fray v. Voules*, 1 El. & E. 839; *Butler v. Knight*, L. R. 2 Ex. 109; *Thomas v. Harris*, 27 L. J. N. s. (Ex.) 353, *Re Wood*, 21 W. Rep. 104. The reason assigned is that the attorney, within the scope of his retainer, is considered the general agent of his client. And it is strongly argued in support of the power, that it ought to be upheld both as a matter of public policy and for the good of the client, inasmuch as the attorney usually knows vastly better than the client whether it is better to risk the trial of the suit or to compromise it, and is often called upon to do the one or the other suddenly in the absence of the client. See *Whart. Agency*, § 590. The English doctrine finds support in a few American cases (*Wieland v. White*, 109 Mass. 392; *Potter v. Parsons*, 14 Iowa, 286; *Holmes v. Rogers*, 13 Cal. 191; *North Missouri R. R. Co. v. Stephens*, 36 Mo. 150; *Reinhold v. Alberti*, 1 Binn. 469); but the main current of decision in this country seems powerfully against it. *Weeks*, Att'y at L. § 228; *Ambrose v. McDonald*, 53 Cal. 28; *Preston v. Hill*, 50 Cal. 43; *Levy v.*

(*u*) *Ringuist v. Ditchell*, 2 Campb. 556, n.

(*x*) *Strauss v. Francis*, L. R. 1 Q. B. 379; 6 B. & S. 365; 35 L. J. Q. B. 133.

ceases, when judgment is recovered; (y) but if, after judgment, the relation of solicitor and client is continued or re-created, the former will have authority to bind the latter by a compromise. (z)

Simple Contracts entered into by Agents in their representative character, on behalf of a principal whose name is disclosed at the time of contracting, must as a general rule, as we have already seen, be enforced by the principal; and the agent cannot bring an action upon them in his own name, (a) unless he can show that he has an interest or a special property in the subject-matter of the contract, or unless he has so contracted as to make himself personally responsible for the fulfilment of the contract. (b) But if a bill of exchange or a promissory note is made payable to one man for "the use," or "for and on behalf," or for the benefit, of another person named on the face of the bill or note, the payee is the proper party to bring an action upon the instrument. (c) When a written contract has been entered into by an agent on behalf of his principal, and the agent's representative character is not disclosed on the face of such written contract, the agent is entitled to maintain an action thereon, unless the principal interferes to prevent him. (d) So if an agent carries on trade for his principal in his own name, and ostensibly on his own account, he is entitled to maintain an action in respect of goods sold by him in the course of that trade, unless the real

Brown, 56 Miss. 83; *Picket v. Merchants' Nat. Bank*, 32 Ark. 346; *Walden v. Bolton*, 55 Mo. 405; *Mandeville v. Reynolds*, 68 N. Y. 528; *Wandhams v. Gay*, 73 Ill. 415; *People v. Quick*, 92 Ill. 580. The American courts, however, favor such compromises when fairly made, and readily uphold them if they can.

"Although," says Chief Justice Marshall (in *Holker v. Parker*, 7 Cranch, 436, 452), "an attorney at law, merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on or not fairly exercised;" see also *Roller v. Wooldridge*, 46 Tex. 485; *Potter v. Parsons*, 14 Iowa, 286; *Fritchey v. Bosley*, 56 Md. 94; *Granger v. Batchelder*, 26 Alb. L. J. 289; and article, 15 Cent. L. J. 241.

(y) *Macbeath v. Ellis*, 4 Bing. 578. 153; 26 L. J. C. P. 15; *Fawkes v. Lamb*,

(z) *Butler v. Knight*, L. R. 2 Ex. 31 L. J. Q. B. 98, *post*, p. * 62.

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(a) *Fairlie v. Fenton*, L. R. 5 Ex. 2 Vent. 307; *Beckham v. Drake*, 9 M. & W. 92, 96.

172; 39 L. J. Ex. 107; *ante*, p. * 40.

(b) *Cooke v. Willson*, 1 C. B. N. S. (d) *Schmaltz v. Avery*, 16 Q. B. 659; 20 L. J. Q. B. 228.

principal interferes, and asserts his right to the sum due. (e) Factors generally sell the goods of their principal in their own names, and are alone known throughout their dealings and transactions to the purchaser; and they are consequently entitled to maintain an action for the price. "Inasmuch as the agent is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless you can also show that he is prohibited from carrying on that action by the person in whose behalf it was made. In such cases you may bring your action either in the name of the person by whom, or of the party for whom, the contract was made." (f)

[* 62] * **Right of Action of Factors, Auctioneers, and Policy-**

Brokers. — If the agent himself has an interest or a special property in the subject-matter of the contract, he is entitled to maintain an action upon it. Where a broker has advanced money on the credit of a cargo consigned to him by his principal for sale, he is entitled to an action in his own name against the buyer, although the sale note given by the broker mentions the name of the principal; (g) and the buyer in such a case cannot set off a debt due to him from the principal in an action by the agent. But if, by the introduction of the name of the principal into the contract, the defendant has been prejudiced, he will be entitled to make use of that circumstance as a defence. So, too, in the sale of goods by a factor, although the principal may be named or known at the time of the sale, yet, as the factor has a claim on the price of the goods in the hands of the buyer for the balance due to him on the general account with his principal, he has a right to require payment of the price, to the extent of such general balance, to himself, and not to the principal. (h) An auctioneer has a special property in goods which he is employed to sell, with a lien for the charges of the sale, the commission, &c.; and he may, therefore, maintain an action against a buyer for the price of goods sold by him, although the sale was at the house of the principal, and the goods were publicly known to be the property of the latter. (i) He has a lien

(e) *Gardiner v. Davis*, 2 C. & P. 49.

(h) *Drinkwater v. Goodwin*, Cowp.

(f) *Bayley, J., Sargent v. Morris*, 3 B.

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& A. 181; *Clay v. Southern*, 7 Exch. 717.

(i) *Williams v. Millington*, H. Bl. 81;

(g) *Atkyns v. Amber*, 2 Esp. 493.

Wolf v. Horne, 2 Q. B. D. 355.

also on the proceeds of the sale as well as on the specific article sold, and seems to be in the same position as a factor who sells goods upon which he has advanced money; so that it is no answer to an action by an auctioneer for the price of goods sold by him to say that before action the defendant paid the price to the principal. (*k*) But it is otherwise if the auctioneer's charges have been paid before action, and the purchaser has a good answer to any action by the vendor for the price; (*l*) and if goods are sold, to be paid for at a future period, and are delivered to the buyer, without notice from the agent that he has any lien or claim on the price for duty, commission upon selling, or the like, and the buyer, in the absence of such notice, settles with the principal, the agent's right of action is destroyed. (*m*) A policy-broker who effects a policy of insurance in his own name, as agent, at the same time declaring for whose use, benefit, or interest the same is made, is entitled to an action on the policy, inasmuch as, by the usage of trade, he has a lien upon it for the premium, which is generally paid by the broker, for

* his commission, and for the general balance due to [* 63] him on the account between himself and his principal.

Repudiation of the Contract by the Principal.—When an agent has entered into a contract of sale for an unnamed and unknown principal, it is no defence to an action brought by the agent upon that contract, to say that the principal afterwards repudiated it. (*n*)

Pretended Assumption of Agency.—When a man has assumed to himself the character of an agent to another, whom he names as his principal, the law will not permit him to shift his situation, and bring an action as the principal and party really interested in the contract, without giving to the defendant previous notice of the situation in which he stands. Having misled the defendant by assuming a character and situation which did not belong to him, he is bound to undeceive him before bringing an action. (*o*) But, if the principal is not named on the face of the

(*k*) *Robinson v. Rutter*, 4 Ell. & Bl. 956; 24 L. J. Q. B. 250.

(*l*) *Grice v. Kenrick*, L. R. 5 Q. B. 340; 39 L. J. Q. B. 175.

(*m*) *Coppin v. Walker*, 7 Taunt. 242.

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(*n*) *Short v. Spackman*, 2 B. & Ad. 962.

(*o*) *Bickerton v. Burrell*, 5 M. & S. 383; *Rayner v. Grote*, 15 M. & W.

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contract, the party professing to contract as agent for an unnamed principal is not precluded from saying at any time, "I am myself that principal," and from asserting his rights in that character. (*p*)

Right of Action of Agents on Contracts under Seal. — If the agent contracts under seal in his own name on behalf of his principal, he may sue upon the contract, although his representative character is disclosed on the face thereof; but if the principal is made to covenant in his own name, and not the agent for him and in his behalf, the agent has then, of course, no right of action at all upon the contract.

Liabilities of Agents on Simple Contracts. — Whenever an agent contracts in his own name for the fulfilment of a particular act or duty, without any qualification of his liability on the face of the contract, he is personally responsible for the fulfilment of the act undertaken to be done, although he was known to be acting only as an agent for some third party, (*q*) unless it was expressly agreed that he was not to incur any personal liability upon the contract. (*r*) Where a person signs a contract in his own name without qualification, he is *prima facie* to be deemed to be a person contracting personally; and, in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal; (*s*) and the use of the words "as agent for" [* 64] in the * body of the contract does not prevent the liability of a party who signs as principal. (*t*) For the words "as agent" may be merely words of description, but if the words "on account of" are used, there is no ambiguity, and the intention to act for another is clear. (*u*) So whenever, in the body of a simple contract in writing, the agent contracts in his own name, and signs his name to the contract, he may render himself personally responsible for the fulfilment of the contract, although he declares that he contracts on behalf of a

(*p*) *Schmaltz v. Avery*, *ante*, p. * 61.

(*s*) *Thompson v. Davenport*, 2 Sm.

(*q*) *Reid v. Draper*, 6 H. & N. 813; 30 L. J. Ex. 268.

Lead. Cas. 6th ed. p. 344.

(*t*) *Paice v. Walker*, 1. R. 5 Ex. 173;

(*r*) *Wake v. Harrop*, 6 H. & N. 768; 39 L. J. Ex. 109; and see *Hough v. 1 H. & C. 202*; 30 L. J. Ex. 273; 31 L. J. Ex. 451.

(*u*) *Gadd v. Houghton*, 1 Ex. D. 357, C. A.

named principal, (x) or that he signs by procuration of, or as agent for, a named principal. (y) If it appears from the general context of the written instrument that the agent himself was to be responsible for the due fulfilment of the contract, the words "for and on behalf," or "as agent for," will be deemed to be mere matter of description, and will not exempt the agent from personal liability; and there is no distinction in this respect between deeds and simple contracts. (z) Whether he is so liable depends upon the terms of the particular contract, construed in connection with the surrounding circumstances and the relative situations of the parties at the time the contract was entered into. (a) If, on the face of the contract, there is an express disclaimer of personal liability on the part of the agent, effect will be given to such disclaimer, although the agent has contracted in his own name on behalf of an unnamed principal; but the agent must have had authority to enter into the contract on behalf of his principal, and must have intended to contract so as to bind the latter. (b) Where an auctioneer subscribed a memorandum, indorsed on particulars of sale, to the following effect: "I, E. Driver, as agent for the vendor, hereby agree to sell to the above-named R. H. Gaby (the plaintiff) the lot thirty-eight referred to in the above memorandum," it was held that the auctioneer had not thereby engaged to be personally responsible for the making out of a good title to the estate. (c) So where an auctioneer, as agent for the landowner, promised in his own name, on behalf of the landowner, that he (the auctioneer) would make out a title, and, the agreement having been signed by the auctioneer and purchaser, the owner, with the knowledge and consent of the purchaser, afterwards added, "I hereby sanction this agreement, and approve of G. Lavender (the auctioneer) *having signed the same on my behalf," to [* 65] which ratification he appended his own signature, it was held that the agreement and ratification might be con-

(x) *Parker v. Winlow*, 7 Ell. & Bl. 942; 27 L. J. Q. B. 49.

(y) *Lennard v. Robinson*, 5 Ell. & Bl. 126; 24 L. J. Q. B. 275.

(z) *Best, C. J.*, *Norton v. Herron*, 1 C. & P. 648; *Ry. & Mood*. 231; *Tanner*

v. Christian, 4 Ell. & Bl. 597; 24 L. J. Q. B. 91.

(a) *Downman v. Williams*, 7 Q. B. 103.

(b) *Oglesby v. Iglesias*, Ell. Bl. & Ell. 930; 27 L. J. Q. B. 356.

(c) *Gaby v. Driver*, 2 Y. & J. 555.

sidered as one transaction, and that it manifested an understanding by all parties that the owner, and not the auctioneer, was to be liable upon the contract. (*d*) And where goods were accepted by an agent under a bill of lading, which made them deliverable unto him "for the London Gas Company, or to his assignees, he or they paying freight for the said goods," and the defendant, on the delivery of the goods, promised to pay the freight, it was held that, as the defendant appeared upon the face of the bill of lading to be merely the agent of the London Gas Company, and had received the goods in that character, and not on his own account, the promise must be taken to have been made by him in his character of agent for the company, to pay the freight on their account, and was not a promise to be personally responsible for it. (*e*)

Whenever the agent contracts as agent, and signs his name adding "as agent," or "by procuration," or signs the name of the principal, adding "by A. B., as agent," and the principal is named in the body of the contract, it will require extremely strong words to control the effect of this form of signature, and render the party so signing personally responsible upon the contract. (*f*) Thus where a charter-party of affreightment, not under seal, was expressed to be made between Jenkins of the one part and Barnes of the other part, and contained divers stipulations between Barnes and Jenkins, and was signed *Ralph Hutchinson* for T. A. Barnes, and Hutchinson had no authority to sign for Barnes, it was held that Hutchinson could not be sued upon the contract, as his name did not appear therein as a contracting party. (*g*)

Contracts by Agents on Behalf of Foreign Principals. — When an English agent is contracting on behalf of a foreign principal, it will in general be presumed that the agent was intended to be responsible for the fulfilment of the contract. (*h*) In such a case, both the agent and the principal are liable upon the con-

(*d*) *Spittle v. Lavender*, 5 Moore, 270.

(*e*) *Amos v. Temperley*, 8 M. & W. 805.

(*f*) *Deslandes v. Gregory*, 29 L. J. Q. B. 95; 30 ib. 36; *Green v. Kopke*, 18 C. B. 549; *Mahony v. Kekulé*, 14 C. B. 390.

(*g*) *Jenkins v. Hutchinson*, 13 Q. B. 744; 18 L. J. Q. B. 274; *Deslandes v. Gregory*, 2 El. & El. 602; 30 L. J. Q. B. 36.

(*h*) *Wilson v. Zulueta*, 14 Q. B. 405; 19 L. J. Q. B. 49; *Cooke v. Wilson*, 1 C. B. N. s. 164.

tract; but the presumption of liability on the part of the agent may be rebutted by the form and terms of the contract. Thus where a written contract was expressed to be made between V, a foreigner resident abroad, and the plaintiff, and the contract was merely * signed by the defendant for V, [* 66] the foreign principal, it was held that the defendant could not be sued upon the contract. (i)

Undisclosed Agencies. — Whenever an agent enters into an agreement or undertaking, and neglects to declare the agency, and to qualify his liability upon the face of the contract, he is personally responsible, and is not in general permitted to show, through the medium of oral evidence, that the other contracting party knew him to be merely an agent, and knew who his principal was, at the time he signed the contract. Such evidence is admitted, as we have already seen, in order to enable a creditor to get at the real principal, and to charge him with the burden of the performance of the contract, but not for the purpose of *discharging* the agent from an agreement or undertaking which is absolute and unqualified upon the face of it, and in which the agent has thought fit to represent himself as the really contracting party. (k) Although brokers contract as such on the face of their bought and sold notes, yet if they do not name their principals, they are by the custom of some trades liable to be treated as principals and sued as such. (l) But if an agent contracting on behalf of his principal has contracted in writing so as to render himself personally responsible upon the written contract, oral evidence is now admissible to show that at the time the contract was entered into, the plaintiff knew the defendant to be only an agent, and that it was expressly agreed that he should not incur any personal liability upon the

(i) *Mahony v. Kekulé*, 14 C. B. 390; 23 L. J. C. P. 54.

(k) *Higgins v. Senior*, 8 M. & W. 844; *Hanson v. Roberdeau, Peake*, 163; *Kendray v. Hodgson*, 5 Esp. 228; *De Gelder v. Savory*, 2 Keb. 812. So by the French law, “Dans tous les engagements que le préposé contracte en son propre nom pour les affaires auxquelles il est préposé, il s’oblige en même temps son commettant comme débiteur accessoire.”—

POTH. *Obl.* No 448; *Gray v. Gutteridge*, 1 M. & R. 618; *Franklyn v. Lamond*, 16 L. J. C. P. 224; 4 C. B. 664.

(l) *Humfrey v. Dale*, 7 El. & Bl. 278; El. Bl. & El. 1004; 27 L. J. Q. B. 390; *Fleet v. Murton*, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49. See *Southwell v. Bowditch*, 1 C. P. D. 374, where a distinction is drawn between the words “bought of you for my principals,” and “sold for you to my principals.”

contract, and that the drawing up the agreement so as to make the defendant personally liable was the result of a mistake, and was contrary to the intention of the parties to the contract. (*m*)

All bills of exchange and promissory notes signed by an agent, without any qualification of his liability, are binding upon the agent; and he cannot discharge himself from liability merely by showing that, at the time he accepted or indorsed the bill, or made the note, he was known to be merely an agent, having himself no interest in, and deriving no benefit from, the transaction. (*n*)

If an agent orders goods, or enters into dealings and transactions in his own name, on behalf of an unknown or [* 67] undisclosed * principal, he is, of course, himself personally liable in respect of such transactions, unless the party with whom he has contracted has discovered the principal, and elected to charge him in preference to the agent. "If an auctioneer sells commodities without saying on whose behalf he sells them, the purchaser is entitled to look to him personally for the completion of the contract." (*o*) And even where the name of the principal appears upon the face of the contract, if the contract shows that the auctioneer is dealing personally with the purchaser, the auctioneer will be personally bound by his contract. (*p*) But if the agent contracts in his representative character avowedly as agent, on behalf of a named or known principal, he is not personally responsible upon the contract, unless he has himself some special interest in the subject-matter of the contract, as presently mentioned and described. (*q*) Wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent; and there is no foundation for holding him liable unless the goods come to his use in some shape or another. (*r*)

(*m*) *Wake v. Harrop*, *ante*, p. *63.

(*n*) *Leadbitter v. Farrow*, 5 M. & S. 345; *Thomas v. Bishop*, 2 Str. 955; *Ex parte Buckley*, 14 M. & W. 469, overruling *Hall v. Smith*, 1 B. & C. 407.

(*o*) *Hanson v. Roberdeau*, Peake, 163;

Franklyn v. Lamonde, 4 C. B. 644.

(*p*) *Wolfe v. Horne*, 2 Q. B. D. 355.

(*q*) *Ante*, p. *62.

(*r*) *Owen v. Gooch*, 2 Esp. 568.

Notoriety of Agency — Public Officers.¹ — If a person is placed in a situation rendering his character of agent notorious

¹ The making of contracts on behalf of the Federal Government has been largely regulated by acts of Congress, the chief of which now in force are embodied in U. S. Rev. Stat. tit. xliii., Public Contracts 5 ; ib. Supp. No. 1, 323, 324.

The following decisions state rules of some importance. An act of Congress directing the head of a department to enter into a contract with parties named, on certain terms, does not of itself create a contract; the rights of the parties are limited by the written contract ultimately made and signed, if its terms are less favorable to them than those permitted by the act. *Gilbert v. United States*, 8 Wall. 358 ; *Parish v. United States*, ib. 489.

The rule that a contract is not complete and does not become binding until a proposal made by one party is met by an acceptance on the part of the other which corresponds with it entirely and adequately, applies to government contracts ; and the government has, ordinarily, the same right as an individual to withdraw an offer at any time before such acceptance has been interposed. *Mayer v. United States*, 5 Ct. of Cl. 317 ; see also *Titcomb v. United States*, 14 ib. 263.

An act of Congress which prescribes how public contracts shall be made should be construed as prohibiting contracts made in a manner substantially different : thus, if it directs that contracts shall be made in writing, a party cannot recover on an oral contract. *Lender v. United States*, 7 Ct. of Cl. 530.

An act which in express terms makes it the duty of heads of departments to require every contract made by them or officers under them, charging the government, to be reduced to writing and signed, should be construed as mandatory and enforced as prohibiting and rendering unlawful any other mode of contracting. *Clark v. United States*, 95 U. S. 539.

The fact that subordinate officers of a department have for many years, with the acquiescence of successive secretaries, disregarded regulations of law in negotiating contracts, does not constitute a legal custom, and cannot annul lawful regulations. A secretary's approval of a particular contract may give it validity, notwithstanding a disregard of the regulations ; but repetition of such approval, no matter how often, cannot operate beyond the particular contracts approved, so as to establish a new rule. *Arthur v. United States*, 16 Ct. of Cl. 422.

Notwithstanding the directions of the act of Congress regulating the making of a contract for supplies have been disregarded, yet, if the supplies have been in good faith furnished to and received by the proper officer, so that government has had the benefit of them, the Court of Claims will entertain an action for the value; see *Adams v. United States*, 7 Ct. of Cl. 437; *Salomon v. United States*, 7 ib. 482; *Belt v. United States*, 15 ib. 92; *Merchants' Exchange v. United States*, ib. 270. This may be done upon the theory of an implied contract for a *quantum meruit*. *Clark v. United States*, 95 U. S. 539 ; s. p. *Campbell v. District of Columbia*, 2 MacArthur, 533. But see *Illinois Cent. R. R. Co. v. United States*, 16 ib. 312; *Carver v. United States*, ib. 361; *Arthur v. United States*, ib. 422.

As to the powers of a public or military officer, or of a special agent of a department, to make a contract which will bind the government, and how far contractors or other individuals are chargeable with notice of limitations of such powers, see *Whiteside v. United States*, 93 U. S. 247; *Thompson v. United States*, 9 Ct. of Cl. 187; *Wilson v. United States*, 11 ib. 513; *Noble v. United States*, ib. 608; *Trenton Locomotive, &c. Manuf. Co. v. United States*, 12 ib. 147; *Parish v. United States*, ib. 609.

As to the necessity, under various acts of Congress, of advertising for pro-

he cannot be made personally liable in respect of his dealings and transactions in the usual course of his employment. Thus the surveyor of a turnpike road, in the employment of the commissioners for highways, is not personally liable to the laborers employed in the repair of the road for their wages; for the contract is, by implication of law, made with the commissioners. (s) Neither is the solicitor under a bankruptcy responsible to a messenger nominated by him for the amount of such messenger's "bill of fees," inasmuch as the messenger must be taken to be aware that the solicitor is not a principal in the transaction. (t) Neither can a witness, who has been subpœnaed to give evidence in a cause conducted by an attorney, maintain an action

posals — except where a pressing emergency exists, — see *United States v. Speed*, 8 Wall. 77; *Fowler v. United States*, 3 Ct. of Cl. 43; *Adams v. United States*, 7 ib. 437; *Salomon v. United States*, ib. 482; *Cobb v. United States*, ib. 470; *McKee v. United States*, 12 ib. 504.

The objection that a contract for labor or supplies furnished to government was not founded on an advertisement for bids as prescribed by law, can be taken on behalf of government only: it is not available to a third person. *Driscoll v. United States*, 13 Ct. of Cl. 15; aff'd, 96 U. S. 421.

Neither an advertisement for proposals, nor proposals submitted in answer, form a part of the contract finally made; but the rights of the parties must be determined by the contract as reduced to writing and executed. *Harvey v. United States*, 8 Ct. of Cl. 501. Compare 13 Op. Att. Gen. 174.

As to the necessity of reducing contracts with the government to writing, see *Garfield v. United States*, 93 U. S. 242; *Clark v. United States*, 95 U. S. 539; *Henderson v. United States*, 4 Ct. of Cl. 75; *Gibbons v. United States*, 5 ib. 416; *Danolds v. United States*, ib. 65; *Burchiel v. United States*, 4 ib. 549; *Lender v. United States*, 7 ib. 530; *Adams v. United States*, ib. 437; *Battelle v. United States*, 8 ib. 295; *Cobb v. United States*, 7 ib. 470.

Where a contract leaves the price of supplies agreed for to be adjusted in future, but the parties fail to agree upon a price, the government must allow a reasonable compensation. *United States v. Wilkins*, 6 Wheat. 135.

Invalidity of part of a contract, although arising from violation of a statutory prohibition, does not necessarily destroy the whole contract; if the residue is separable and lawful, it may be enforced. *Northern Pacific R. R. Co. v. United States*, 15 Ct. of Cl. 428.

Application of the doctrines of estoppel and ratification to government contracts made without original authority, or framed without proper compliance with directions of law. *Gibbons v. United States*, 5 Ct. of Cl. 416; *Danolds v. United States*, ib. 65; *Burchiel v. United States*, 4 ib. 549; *Freedman's Bank v. United States*, 16 ib. 19; *Arthur v. United States*, ib. 422; *Pacific Mail Case*, ib. 621.

Offer of a reward, acted on, a contract. *Briggs v. United States*, 16 Ct. of Cl. 48.

(s) *Poehein v. Pawley*, 1 W. Bl. 670. *gregor v. Deal & Dover, &c.*, 22 L. J.

(t) *Hartop v. Jukes*, 2 M. & S. 438; *Q. B. 69.*

Russell v. Reece, 2 C. & K. 669; *Mac-*

against the latter for his expenses of attendance, as it is notorious that the attorney is a mere agent, and the witness knows that he attends to give evidence not for him but for his principal. (*u*) If, however, the agent himself has any interest in the subject-matter of the contract, — if he acts for himself, as well as for third parties whom he professes to represent, — he cannot escape from liability under a plea of agency. In such a case he is both principal and agent, and is responsible accordingly.

* **Masters of Ships**, being something more than mere [* 68] agents, are personally responsible in respect of stores and necessaries furnished for the use of vessels under their command, and for repairs done by their orders, unless they expressly guard themselves from personal liability, and confine the credit to the owners of the vessel. (*x*) A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action. The creditor has an election to sue either the one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other. (*y*)

Pretended Agencies.¹ — When the agent contracts without authority from the principal on whose behalf he professes to act, the nature and extent of his liability will depend upon the nature and form of the contract. He cannot, as we have seen, be sued in any case upon the contract, if he has not contracted therein in his own name (*ante*, p. * 65), although he may be liable to the plaintiff for warranting or representing himself to be an agent, and to have authority to make the contract, when he is not the agent and had no such authority: (*z*) provided the

¹ As to the legal effect of the acts of an agent done after the death of his principal, see 19 Am. L. Reg. n. s. 401, where the common-law rule that there can be no act by a dead man, the civil law or equitable rule sustaining acts done in good faith and without notice, and a compromise rule found in Ohio decisions, are compared.

(*u*) *Robins v. Bridge*, 3 M. & W. 118. 195; *Pow v. Davis*, 1 B. & E. 220; 30 L. J. Q. B. 257; *Hughes v. Græme*, 34 L. J. Q. B. 335; *Cherry v. Bank of Australasia*, L. R. 3 P. C. 24; 38 L. J. P. C. 49; *Richardson v. Williamson*, L. R. 6 Q. B. 276; 40 L. J. Q. B. 149; *Patchett*, 7 E. & B. 568; 26 L. J. Q. B. Weeks v. Propert, L. R. 8 C. P. 427;

misrepresentation was a misrepresentation of fact, and not merely of law. (a) A person who contracts in his own name on behalf of another, but who is really a principal, cannot shelter himself from responsibility by describing himself on the face of the contract as an agent, and providing that he shall not be personally responsible. (b) Where a contract is signed by one who professes to be signing as agent, but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it, and a stranger cannot by a subsequent ratification relieve him from that liability. (c) If the acceptor of a bill of exchange professes to accept per procuration as agent, he is responsible upon the bill, if he was himself the principal, and acted without the authority of the party on whose account he professed to act. (d) But the burden of proving that the party describing himself on the face of the contract as agent is in truth the principal falls upon the plaintiff seeking to falsify the contract and to show that the defendant assumed a false position. (e) "One person may," observes Erle, J., "assert he has authority to make a contract on behalf of another, and *bona fide* believe it, and yet it may be deceit if he makes the positive assertion without disclosing the grounds on which he erroneously, as it turns out, believes it." (f)

Where, therefore, the defendant represented himself to be the agent of one Gardner, and as such authorized to let an estate to the plaintiff, and the defendant had no authority to let the property, although he believed that he had, and in consequence of that mistake the plaintiff was induced to lay out money upon the estate, relying on the representation, it was held that the

McCollin v. Gilpin, 5 Q. B. D. 390; 6 Q. B. D. 516; Beattie v. Ebury, L. R. 7 H. L. 102; Dickson v. Reuter's Telegraph Co., 3 C. P. D. 1; Chapleo v. Brunswick Building Society, 6 Q. B. D. 696.

(a) Rashdall v. Ford, L. R. 2 Eq. 750; 35 L. J. Ch. 769; Beattie v. Lord Ebury, L. R. 7 Ch. 777; 41 L. J. Ch. 804.

(b) Schmalz v. Avery, 20 L. J. Q. B. 229.

(c) Kelner v. Baxter, L. R. 2 C. P. 174; 36 L. J. C. P. 94.

(d) Owen v. Van Uster, 10 C. B. 324.

(e) Carr v. Jackson, 21 L. J. Ex. 187; 7 Exch. 382.

(f) Jenkins v. Hutchinson, 13 Q. B. 748; Randell v. Trimen, 18 C. B. 786; 25 Law J. C. P. 307; Richardson v. Dunn, 8 C. B. N. S. 655; 30 Law J. C. P. 44.

defendant was liable for all the expenses incurred by the plaintiff on the strength of the representation. (*g*) "I am of opinion," observes Willes, J., "that a person who induces others to contract with him as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages he sustains by reason of the assertion of the authority being untrue. This is not the case of a bare misstatement to a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, in so far as the person he has induced to contract is concerned, in no way aids him, or alleviates the inconvenience and damage which he sustains. If one of the two in such cases is to suffer, it ought not to be the person who has been guilty of no error, but he who, by an untrue assertion, believed and acted upon, as he intended it should be, and touching a subject within his peculiar knowledge, and as to which he gave the other party no opportunity of judging for himself, has brought about the damage. The obligation arising in such a case is well expressed by saying that the person professing to contract as agent for another impliedly undertakes with the person who enters into such a contract, upon the faith of his being duly authorized, that the authority he professes to have does in point of fact exist." (*h*) Thus where a person lent money to a building society, and received a receipt signed by two directors, but the society had no power to borrow money, it was held that, by signing the receipt, the directors in effect represented that they had authority to make a valid contract of loan on * behalf of the society, and [* 70] that they were therefore personally liable to repay the money. (*i*)

If the authority is of a public nature, or the grounds of it are known to the other contracting party, and the agent does no more than express his own opinion and belief as to the nature

(*g*) *Collen v. Wright*, 8 Ell. & Bl. 647; 26 L. J. Q. B. 147; 27 ib. 215.

(*h*) *Collen v. Wright*, *supra*; *Pow v. Davis*, 4 B. & S. 220; 30 L. J. Q. B. 257.

(*i*) *Richardson v. Williamson*, L. R. 6 Q. B. 276. See *Cherry v. Colonial Bank of Australasia*, L. R. 3 P. C. Ca. 24; *Leather v. Simpson*, L. R. 11 Eq. Ca. 398.

and extent of the authority vested in him, and manifests an intention merely to bind the principal if he has power so to do, and guards himself against any positive representation of authority, he will not then be responsible if it should turn out that he had not the power he was supposed to possess. (*k*)

A mistake made by an agent in describing the quantity of goods he has bought for his principal, or the time of their delivery, or the price to be paid for them, may render such agent liable to his principal for negligence or for a breach of duty, (*l*) but does not render him liable to an action for deceit; (*m*) it is otherwise, however, if he knowingly makes a false representation with intent to deceive his employer. (*n*)

Contracts by the Agents of Irresponsible Principals. — Government Agents. — If the other contracting party chooses to give credit to a known irresponsible principal, acting through the medium of an agent, taking his chance of payment from such principal, the agent will not, in such a case, be liable upon the contract. (*o*) If the agent acts in a public employment, and the extent of his authority is as much known to the party contracting with the agent as to the agent himself, and it is manifest that the former intended to rely on the subsequent ratification of the contract by the principal, and was not led into the contract by any misstatement or misrepresentation on the part of the agent respecting his authority in the matter, the agent will not incur any personal liability. Thus the governor of a fort, or of a colony, is not personally answerable for stores ordered by him for the use of government; neither is a military commissary, nor the captain of a troop, liable for forage supplied to the army or to the troop, nor for provisions furnished to the men; nor is the first Lord of the Treasury personally answerable for the expenses incurred by a person employed in raising a regiment for the service of government; (*p*) nor is the Secretary of War liable to a retired clerk of the War Office for his retired

(*k*) *Macgregor v. Deal and Dover Ry. Co.*, 22 L. J. Q. B. 69.

(*l*) See *per* Blackburn, J., *Ireland v. Livingston*, L. R. 5 Engl. and Ir. App. 395.

(*m*) *Thorn v. Bigland*, 8 Exch. 729.

(*n*) *Pewtriss v. Austen*, 6 Taunt. 522.

(*o*) *Lewis v. Nicholson*, 18 Q. B. 503
21 L. J. Q. B. 311; *Wake v. Harrop*,
6 H. & N. 768; 1 H. & C. 202; 30 L. J.
Ex. 273; 31 ib. 451.

(*p*) *Rice v. Chute*, 1 East, 579; *Myrtle v. Beaver*, Id. 135; *Macbeath v. Haldimand*, 1 T. R. 180.

allowance, although such allowance * was included in [* 71] the yearly estimates drawn for by such secretary, and received by him as applicable to such specific allowance, there being no duty from which the law will imply a promise from the secretary, who is the agent and officer of the crown, and responsible only to the crown for the due execution of the trust committed to him. (*q*) In all these cases, the nature and extent of the agent's authority are as much known to the party with whom he contracts as to the agent himself; and it is obvious that in these public transactions the individual credit of the agent is not intended to be pledged, but that the parties who contract with him rely on the honor and good faith of the irresponsible principal. The agent of a foreign government cannot be sued upon their bonds. (*r*)

The clerk of the County Court, giving orders for the fitting up of a building for the holding of the sittings of the court, is not a public officer acting in a public employment, so as to be exonerated from liability in respect of the order so given. (*s*)

Money received by Agents for the Principal. — If money be paid to a known agent for the use of his principal, an action for money had and received cannot be sustained against the agent if it appears that the principal has the least color of right to the money; for the courts will not try the right of the principal to the money in an action against the agent. (*t*) The agent having received the money on behalf of the principal, and for his use, is accountable to the latter for it. The maxim *respondeat superior* therefore applies; and the agent, whether he has paid over the money, or whether he has not, is answerable to the principal alone. (*u*) But if the payment to the agent is void *ab initio*, so that the money never was received by him for the use of his principal, and he is consequently not accountable to the latter for it, he is bound to refund the amount, if he has not actually paid

(*q*) *Gidley v. Lord Palmerston*, 3 B. & B. 275; 7 Moore, 91. See also *Palmer v. Hutchinson*, 6 Ap. Cas. 619.

(*r*) *Twycross v. Dreyfus*, 5 Ch. D. 605, C. A.

(*s*) *Autey v. Hutchinson*, 17 L. J. C. P. 304.

(*t*) *Sadler v. Evans*, 4 Burr. 1985; *Greenward v. Hurd*, 4 T. R. 553.

(*u*) *Dixon v. Hamond*, 2 B. & Ald. 313; *Hardman v. Willcock*, 9 Bing. 382, n.; *Stephens v. Badcock*, 3 B. & Ad. 354; *White v. Bartlett*, 9 Bing. 378; 2 M. & Sc. 520; *Goodall v. Lowndes*, 6 Q. B. 464.

it over, or settled for it in account with his principal, at the time he receives notice of the mistake. Thus, if money, through a mistake of fact, is paid to an agent, and placed by him to the account of his principal, but not paid over, an action lies against him for the recovery of the money; and the mere passing such money in account, making rests without any new credit given, fresh bills accepted, or further sum advanced to the principal in

consequence of it, is not equivalent to a payment of it [* 72] over. (x) * But, if he has paid it over or settled for it in account with his principal, he cannot be compelled to refund it. (y) If, however, he misleads the plaintiff by giving him to understand that he has not paid over the money, and thereby induces the plaintiff to sue him for its recovery, he is then precluded from insisting on the defence of payment over. (z)

Money wrongfully and illegally received by Agents. — The doctrine that the receipt of the agent is the receipt of the principal does not extend to the case of a wrong-doer; so that, if an agent gets money into his hands by his own fraudulent or illegal act, he cannot discharge himself from liability by paying it over to his principal. (a)

Receipt of Money by Agents to be paid over to a Stranger. — The mere circumstance of money having been paid by a principal to his agent, with directions to pay it to a third person, imposes, as we have already seen, (b) no liability upon the agent to such third person, unless there is an express or implied assent on the part of the agent to pay the money according to the directions he has received; and the mere receipt of the money by the agent is no evidence of an implied assent to apply it to the purposes for which it was professedly remitted to him. He holds the money for the use of the remitter: the privity of contract is between him and his principal, and not between the agent and such third party, until by some act done, or by some engagement entered

(x) *Buller v. Harrison*, 2 Cowp. 565; 32 L. J. Q. B. 297; *Shand v. Grant*, 15 Bishop v. Eagle, 10 Mod. 23; *Cox v. C. B. N. s. 324.*
Prentice, 3 M. & S. 344; *Horsfall v. (z) Edwards v. Hodding*, 5 Taunt. 816.
Handley, 2 Moore, 5; 8 Taunt. 136; (a) *Townson v. Wilson*, 1 Campb.
Holland v. Russell, 30 L. J. Q. B. 312; 397; *Anon.*, ib. 398, n.; *Clark v. John-*
Newall v. Tomlinson, L. R. 6 C. P. son, 3 Bing. 426; *Miller v. Aris*, 1 Selw.
 405. N. P. 90, n.

(y) *Holland v. Russell*, 4 B. & S. 14; (b) *Ante*, p. * 27.

into with the person who is the object of the remittance, the agent has consented to appropriate the money to his use. (*c*)

Liabilities of Agents on Contracts under Seal.—The liability in the case of deeds is always confined to the person who has contracted therein in his own name, and who has sealed and delivered the deed, and does not extend to the person on whose behalf and for whose benefit the contract is expressed to be made. When, therefore, an individual acting in a private capacity, and not on behalf of the government, covenants in his own name, under his own hand and seal, for the act of another, he is personally bound by his covenant, although he describes himself in the deed as covenanting “for and on the part and behalf” of such other person; for “a man may bind himself for the act of another, and to pay out of a fund not his own, and will be liable in either * case.” (*d*) A proviso totally inconsistent with any personal liability, where no fund is pointed out or provided for the payment of the money, has been held to be repugnant and void; (*e*) but a proviso limiting but not destroying the liability is valid; (*f*) it has also been held that an agent may contract for a principal on the express terms that he is himself to incur no personal liability, whether the principal is, or is not, bound by the contract. (*g*)

Exemption of Public Officers.¹—When upon the face of a contract under seal it appears that the covenantor is an officer act-

¹ The contracts made on behalf of the government by a public officer or agent acting with legal authority and in the line of his duty are public, and not personal; they bind the government, not the officer. The fact that the officer in executing such a contract describes himself and his successors as the contracting party, or that he affixes his own seal, makes no difference. *Hodgson v. Dexter*, 1 Cranch, 345. *s. p.* *Jones v. Le Tombe*, 3 Dall. 384.

Although a government officer or agent is not ordinarily responsible, individually, upon a contract made by him in behalf of the government, but the only claim upon such contract is against the government, yet the officer may, either voluntarily or by exceeding his authority, make himself personally liable. 7 Op. Att.-Gen. 88.

(*c*) *Moore v. Bushell*, 27 L. J. Ex. 3; *Hill v. Royds*, L. R. 8 Eq. 290; 38 L. J. Ch. 538; *New Zealand Co. v. Watson*, 7 Q. B. D. 374.

(*d*) *Appleton v. Binks*, 5 East, 148; *Talbot v. Godbolt*, Yelv. 137; 5 Bacon's Abr. 372; *Hancock v. Hodgson*, 12 Moore, 504.

(*e*) *Furnivall v. Coombes*, 5 M. & G. 736; 6 Sc. N. R. 536.

(*f*) *Williams v. Hathaway*, 6 Ch. D. 544.

(*g*) *Wake v. Harrop*, 6 H. & N. 678; 30 L. J. Ex. 273; 1 H. & C. 202; 31 L. J. Ex. 451.

ing in a public capacity in discharge of his duty to the crown or the country, he is not personally liable for the fulfilment of the contract, unless he gives his own undertaking and it plainly appears to have been the intention of the contracting parties that he should himself be responsible for the performance of the act covenanted to be done; for it would be detrimental to the public service to hold that governors and commanders-in-chief were personally responsible upon contracts entered into by them in the execution of their duty, unless the intention of the contracting parties that they should be liable was plainly manifested upon the face of the contract. (*h*)

Execution of Deeds by Agents not rendering them personally Liable.¹ — There is a wide distinction between entering into a deed for and on behalf of another, and merely executing it in his behalf. If an agent is duly authorized by power of attorney under seal to enter into and execute a deed for his principal, and the principal is made to contract in his own name, and the agent merely executes the deed for him, the principal, and not the agent, is bound by the execution of the deed. In such a case it is usual to denote by some form of words that the deed is executed by an agent on behalf of the principal; the agent either signs his own name, adding "for B" (the principal), or he signs the name of B, adding "by A, his attorney." When the principal himself is made to covenant, and the agent appears merely as the executing party, if the agent has not an authority under seal to warrant his acts, there is no binding contract at all; the principal cannot be bound, as he has not legally sanctioned the contract, and the agent cannot be made liable upon it, as he has not contracted in his own name.

Of the Rights of Partners upon Contracts with Third Parties.—

If a contract is entered into with one partner in his individual capacity, and apparently on his own account, but in reality on behalf of the firm of which he is a member, and the joint interest and joint consideration are not disclosed upon the face of the writing, the partner so contracting

(*h*) *Wake v. Harrop*, *supra*; *Unwin v. Wolseley*, 1 T. R. 674; *Allen v. Waldegrave*, 2 Moore, 628.

¹ See an article, 14 Cent. L. J. 182.

stands in the position of an agent dealing on behalf of an undisclosed principal; and either the partner with whom the contract is so made, or the firm, as the parties really interested in it, may enforce it, (*i*) the defendant being entitled, in the latter case, to set up against the firm any defence that he would have had to an action brought by the one partner alone. (*k*) Thus if a written contract for the sale of goods, the joint property of several partners, be entered into by one of them in his own name only, all the partners may enforce it, although the purchaser had at the time no knowledge that there were other persons interested in the transaction besides the one he had contracted with. (*l*)

Implied Contracts and Promises with Firms in Partnership. —

If a service or benefit, in respect of which the law implies a promise, moves from a firm in partnership, the promise is a joint promise in favor of all the partners. (*m*) If, on the other hand, it moves from one partner separately and individually on his own account, it is a private contract in which the partnership has no concern. (*n*) Whenever the services have been rendered by the one partner on the partnership account, and the remuneration for such services belongs to the joint purse, all the partners are jointly interested in the consideration. (*o*) When the money of the partnership has been lent by the one partner alone, there is an implied promise of repayment in favor of all the partners; (*p*) but, if they permit one partner to deal with the partnership property in his own name, as the sole owner of it, or as the sole party interested, they cannot stand in a better situation than the one partner who has been permitted so to act. (*q*) And when one party lends money in his own name, and nominally on his own account, but really on account of and as the loan of the firm, the firm, if it sues for the money, must show clearly and distinctly that the advance was made on its account, and as a loan from the partnership, although the fact might at the time

(*i*) *Alexander v. Barker*, 2 Tyr. 147; 2 Cr. & J. 133.

(*k*) *Stracey v. Deey*, 7 T. R. 361, n.; *Gordon v. Ellis*, 13 L. J. C. P. 179; 2 C. B. 821.

(*l*) *Skinners v. Stocks*, 4 B. & Ald. 437.

(*m*) *Bond v. Pittard*, 3 M. & W. 357; *Lambert's case*, Godb. 244.

(*n*) *Brandon v. Hubbard*, 4 Moore, 367.

(*o*) *Arden v. Tucker*, 4 B. & Ad. 815.

(*p*) *Alexander v. Barker*, 2 C. & J. 139.

(*q*) *Lucas v. De la Cour*, 1 M. & S. 249; *Gordon v. Ellis*, 2 C. B. 821; 13

L. J. C. P. 182; *Robson v. Drummond*, 2 B. & Ad. 303.

be unknown to the borrower; for, as we have before [* 75] seen, "if B lends money to A, * and A makes a further loan of it to C, B would have no right of action against C to recover it back." (r)

Trust Services by Partners. — If one of the partners is a trustee, and work is done by the firm in the execution of the trust, the firm cannot charge for their trouble and services. (s)

Contracts with the Trustees or Directors of Copartnerships. — In order to obviate the inconvenience arising from deaths and changes in a firm, when a large number of persons are associated together in partnership, recourse has been had to trustees, who have been appointed to conduct the business of copartnerships, and enter into contracts for the general benefit of the concern. (t) When a number of persons are associated together in partnership in this manner, the trustees have the general conduct and management of the copartnership, and form the acting partners of the concern, whilst the others contribute merely their capital and receive accruing profits in proportion to their interests, and stand, consequently, in the position of dormant partners. All simple contracts entered into with the copartnership by name, or with one or more of the trustees, are, in contemplation of law, entered into with all of them jointly, as the acting partners performing the ostensible acts of the copartnership. (u) They are also, as the acting partners, jointly interested in all implied contracts arising out of partnership transactions. (x)

Liabilities of Partners upon Simple Contracts.¹ — Each member of a complete partnership is liable for himself, and as agent

¹ Partnerships between attorneys do not confer on individual members full power to charge the others by ordinary contracts, such as bills or notes for money borrowed, purchases of goods, or even engagements connected with, but out of the ordinary course of professional employment. Weeks, Attys. § 244. The proper obligations of the vocation, however, extend to all the members of a firm undertaking the prosecution or defence of a suit; the client is presumably entitled to the united exertions of all the partners; and their duty of professional service is a joint one, continuing to the termination of the suit; and cannot be released by any dealings between themselves, and as a voluntary dissolution. Ib. For moneys

(r) *Sims v. Bond*, 5 B. & Ad. 389.

(u) *Phelps v. Lyle*, 10 Ad. & E.

(s) *Mathison v. Clark*, 18 Jur. 1020. 113.

(t) *Metcalf v. Bruin*, 12 East, 404— (x) *Lefevre v. Boyle*, 3 B. & Ad. 840; 406; *Clay v. Southern*, 21 L. J. Ex. Megginson v. Harper, 2 C. & M. 322. 202; 7 Exch. 717.

for the rest binds them, upon all contracts made in the ordinary course of the business of the copartnership. (y) Where partners simply agree to carry on a partnership of which the term is not fixed, one of those partners has no authority to take a lease so as to bind the others. (z) But every one of the partners in a general trading partnership is, in contemplation of law, in the absence of any known controlling stipulation between them, clothed with an implied authority to enter into simple contracts on behalf of the firm in furtherance of the ordinary business of the copartnership, and to use the trading name of the firm in all such contracts and in all dealings and transactions in respect of which partners in such trade usually have authority to bind one another; and each of the partners is individually liable for the performance of such contracts in the same manner

as if they had been entered into * personally by him- [* 76]

self. (a) But this implied general authority is confined to general partnerships in trade, where the partners are jointly interested in the capital stock of the business, as well as in the profits accruing therefrom, and does not extend to partnerships in particular transactions, or to limited partnerships in profits, where the partner has no interest in the capital stock. Thus where an author and publisher agree to publish a work for their mutual profit, upon the understanding that the author is to write the book and the publisher to print and publish it at his own expense, there is no implied authority from the author to the publisher to contract for the supply of paper, or for the printing, or for any other matter necessary for the publication of the work, so as to render the author responsible for the price of the paper, or for printing, or advertisements, or anything else ordered by the publisher for the purposes of the publication. (b)

collected by either, all members of the firm are liable; and a demand served on one operates as a demand upon all. *Ib.*; *Bryant v. Hawkins*, 47 Mo. 410. Partnerships between attorneys are, however, so far analogous to those between merchants that a contract within the proper scope of professional business, made by one partner in the firm name, will bind the others. *Ib.* 314.

(y) *Ld. Wensleydale, Ernest v. Nicholls*, 6 H. L. C. 418; *Cox v. Hickman*, 9 C. B. N. s. 99; 8 H. L. C. 268; 30 L. J. C. P. 125; *Kilshaw v. Jukes*, 3 B. & S. 847; 32 L. J. Q. B. 320.

(z) *Sharp v. Milligan*, 22 Beav. 610.

(a) *Poth. Obl. No. 83.*

(b) *Wilson v. Whitehead*, 10 M. & W. 503.

Where several coach-proprietors agree to undertake the carriage of passengers and parcels on a certain line of road for their mutual profit, and divide the road into districts, and each proprietor hires and conveys the coach over his own district, finding his own horses, harness, and servants, stables, hay, straw, and horsekeepers for the execution of his share of the undertaking, one has no authority to bind the others by contracts for the employment of servants, or for the purchase of horses, hay, straw, or any other thing necessary for the carriage of the passengers. (c) But they are each clothed with an implied authority to enter into all customary and reasonable contracts with the passengers for their conveyance, and all, consequently, may be bound thereby; (d) and if one of them whose business it is to hire coaches, contracts with a coach-maker for the supply of coaches to run throughout along the whole line of road, and not merely for his particular district, this is a contract with the whole partnership, and all are jointly responsible upon it. (e)

A partnership contract for value given to the partnership, being a mercantile partnership, is several as well as joint. (f)

Who may be made liable as Partners.¹—Where a person is sought to be made liable on the ground of his being a partner,

¹ Persons may be partners as between themselves (that is, each may have the rights and be subject to the liabilities of a partner towards his associates) who are not to be deemed partners as towards third persons. Conversely, a person may be liable as a partner towards third persons who have given credit to the firm on a reasonable belief of his membership, while he is not a partner as towards other members. This distinction is important in understanding the decisions. The aspect of the subject presented in the text is that of liability as a partner towards third persons; which may be established either by proving that defendant and his associates intentionally constituted themselves a firm,—that is, appointed each the general agent of all in the prosecution of an enterprise or business for joint profit or loss,—or by showing that he has been held out as partner. Persons may often be adjudged partners as towards creditors when they could not be so regarded as between themselves. *Lycoming Ins. Co. v. Barriger*, 73 Ill. 230; *Stanchfield v. Palmer*, 4 Greene, 23; *Gill v. Kuhn*, 6 Serg. & R. 333; *Kellogg v. Griswold*, 12 Vt. 291. Thus (although between the partners partnership depends on intention), in favor of third persons a partnership may arise by implication or imputation of law. *Hazard v. Hazard*, 1 Story, 371; *Gilpin v. Temple*, 4 Harr. (Del.) 190; *Kelleher v. Tisdale*, 23 Ill. 405; *New Orleans v. Gauthreaux*, 32 La. Ann. 1126. Creditors may establish a partnership for the purpose of holding all

(c) *Barton v. Hanson*, 2 Taunt. 49.

(f) *Beresford v. Browning*, L. R. 20

(d) *Helsby v. Mears*, 8 D. & R. 289. Eq. 564.

(e) *Arthur v. Dale*, Collyer, Part. 330.

the true test is whether or not he has constituted the other alleged partner his agent in respect of the partnership business

the partners liable for debts, by proof that they have held themselves out as partners, although there may never have been an actual agreement creating a partnership. *Bisel v. Hobbs*, 6 Blackf. 479; *Bryer v. Weston*, 16 Me. 261; *Gilbert v. Whidden*, 20 Me. 367; *King v. Ham*, 4 Mo. 275; *Anderson v. Levan*, 1 Watts & S. 334; *Widdifield v. Widdifield*, 2 Binn. 245; *Taylor v. Henderson*, 17 Serg. & R. 453; *Central City Sav. Bank v. Walker*, 66 N. Y. 424; *Fisher v. Bowles*, 20 Ill. 396; *Sherrod v. Langdon*, 21 Iowa, 518; *Grieff v. Boudousquie*, 18 La. Ann. 631; *Gumbel v. Abrams*, 20 La. Ann. 568; *Mershon v. Hobensack*, 22 N. J. L. 372; *Craig v. Warner*, 3 Phila. 298; *Crozier v. Kirker*, 4 Tex. 252; *Stearns v. Haven*, 14 Vt. 540; but see *Dixon v. Hood*, 7 Mo. 414. So actual participation in profits may render a person liable for losses of a business, though it was ostensibly carried on by another as an individual for his sole benefit, though the defendant's relations to it were concealed, and even though a stipulation existed between the two that they should not be deemed partners. *Bigelow v. Elliott*, 1 Cliff. 28; *Parker v. Canfield*, 37 Conn. 250; *Manhattan Brass, &c. Co. v. Sears*, 45 N. Y. 797; *Ontario Bank v. Hennessey*, 48 N. Y. 545; *Leggett v. Hyde*, 58 N. Y. 272; *Greenwood v. Brink*, 1 Hun, 227; *Haas v. Roat*, 16 Hun, 526. And, on the principles of estoppel, one who has represented himself, or allowed others to represent him, as member of a certain firm may be held responsible accordingly, although in fact he may never have had any interest in its concerns. *Tabb v. Gist*, 1 Brock. 33; *Benedict v. Davis*, 2 McLean, 347; *Buckingham v. Burgess*, 3 McLean, 364, 549; *Re Jewett*, 15 Bankr. Reg. 126; *Campbell v. Hastings*, 29 Ark. 512; *Bowie v. Maddox*, 29 Ga. 285; *Carmichael v. Orier*, 55 Ga. 116; *Thomas v. Green*, 30 Md. 1; *Rice v. Barrett*, 116 Mass. 312. See also an article, *Who are Partners*, 15 Am. L. Rev. 785.

The general doctrine established under the "limited partnership" laws existing in many of the States (which allow an individual to contribute a specific sum to the capital of the firm, and to limit his liability for losses to that amount, by complying with certain requirements as to filing articles and certificate of payment, publishing notice, &c.), is, that unless the directions of the statute are completely obeyed, the special partnership authorized is not created, but the contracts of the firm bind the intending special partner as a general one. *Re Merrill*, 2 Blatchf. 221, 13 Bankr. Reg. 91; *Re Terry*, 5 Biss. 110; *Pierce v. Bryant*, 5 Allen, 91; *Argall v. Smith*, 3 Den. 435, 6 Hill, 479; *Peers v. Reynolds*, 11 N. Y. 97; *Haviland v. Chace*, 39 Barb. 283; *Andrews v. Schott*, 10 Pa. St. 47; *Richardson v. Hogg*, 38 Pa. St. 153; *Van Riper v. Poppenhausen*, 43 N. Y. 68; *Vandike v. Roskam*, 67 Pa. St. 330; *Levy v. Lock*, 5 Daly, 46, 47 How. Pr. 394; *Van Ingen v. Whitman*, 62 N. Y. 513; *Durant v. Abendroth*, 41 N. Y. Superior Ct. 53, 69 N. Y. 148; *Pfirman v. Henkel*, 1 Ill. App. 145.

The affidavit to accompany the certificate need not follow the exact words of the statute; if it avers the facts required by the law it is sufficient, and it may be explained by reference to the certificate. *Johnson v. McDonald*, 2 Abb. Pr. 290.

The facts that the special partner was induced to enter the firm by fraudulent representations, and withdrew as soon as he discovered the fraud, will not protect him from the liability of a general partner to the creditors upon contracts made meantime. *Tournade v. Hagedorn*, 5 Thomp. & C. 288; *Tournade v. Methfessel*, 3 Hun, 144.

Unless special partners have known and acquiesced in a departure by the general partners from the mode of conducting the business prescribed by law, such

to carry it on on his behalf. A participation in the profits, though cogent, is not conclusive evidence of a partnership. (*g*) And it is now * established, that although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such perception alone, it may, as a presumption, not of law, but of fact, be inferred, yet that whether that relation does or does not exist must depend on the real intention and contract of the parties. (*h*) Thus an assignment to trustees for the benefit of creditors, upon trust to divide the profits of the business amongst the creditors in reduction of their debts, does not render the creditors who execute the deed and participate in the profits responsible to third parties as partners. (*i*) "The law as to partnership," says Lord Wensleydale, "is a branch of the law of principal and agent. A partner embraces both characters; and where a man orders another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, he is the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts. This is the true principle of partnership liability." (*k*) By the 28 &

departure does not render them liable as general partners. *Taylor v. Rasch*, 11 Bankr. Reg. 91, 1 Flip. 385.

A special partner is not rendered liable as general partner by a misappropriation of the capital contributed by him, if made by the general partner without his privity. *Seibert v. Bakewell*, 87 Pa. St. 506.

No matter how the special partner has acquired the money he contributes, if it is his property, and he pays it in under the forms prescribed, and leaves it absolutely to the risks of the business, he is not liable beyond it upon the contracts made by the general partner. *Lawrence v. Merrifield*, 42 N.Y. Superior Ct. 36.

A special partner will be held liable as a general partner for sales made to the firm under representations by him that his interest was a general one. *Barrows v. Downs*, 9 R. I. 446.

Some early cases hold that a creditor who had notice when he dealt with the firm of the intended limitation of the special partner's liability, cannot claim to hold him as a general partner. *Ensign v. Wands*, 1 Johns. Cas. 171; *Hastings v. Hopkinson*, 28 Vt. 108.

(*g*) *Cox v. Hickman*, 8 H. L. C. 268; 30 L. J. C. P. 125; *Kilshaw v. Jukes*, 3 B. & S. 847; 32 L. J. Q. B. 217; *Bullen v. Sharp*, L. R. 1 C. P. 86; 35 L. J. C. P. 105; *English and Irish Church and University Assurance Society, In re*, 1 H. & M. 85.

Court of Wards, L. R. 4 P. C. 419; *Holme v. Hammond*, L. R. 7 Ex. 218; 41 L. J. Ex. 157; *Pooley v. Driver*, 5 Ch. D. 560; *Ex parte Tenant*, 6 Ch. D. 303.

(*i*) *Cox v. Hickman*, 9 C. B. N. s. 47; 8 H. L. C. 268; 30 L. J. C. P. 125.

(*h*) *Mollwo, March, & Co. v. The*

(*k*) *Cox v. Hickman, supra*.

29 Vict. c. 86, s. 1, the advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such. By sect. 2, no contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, or give him the rights of a partner. By sect. 3, no person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of, or be subject to, any liabilities incurred by such trader. By sect. 4, no person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of, or be subject to the liabilities of, the person carrying on such business. By sect. 5, in the event of any such trader as aforesaid being adjudged a bankrupt, * or taking the [* 78] benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than 20s. in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interests payable in respect of such loan, nor shall any such vendor of a good-will as aforesaid be entitled to recover any such profits as aforesaid, until the claims of the other creditors of the said trader for valuable consideration, in money or money's worth, have been satisfied. By sect. 6, in the construction of the Act, the word "person" is to include a partnership firm, a joint-stock company, and a corporation.

The above statute was passed to give protection against outside creditors to persons lending money to others in business. (l)

(l) See *per* *Ld. Cairns* in *Syers v. Syers*, 1 Ap. Cas. 174, at p. 182.

In order to bring a case within the statute, there must be a contract in writing, signed, (*m*) and the document must show on the face of it that the transaction is a loan, and parol testimony to vary it is inadmissible. (*n*) The whole intent and scope of the document must be looked to. The mere statement that the transaction is a loan, and the party is not a partner, will not prevent him from being a partner, (*o*) nor will the mention of the word partnership by itself constitute a partnership, though it may be strong evidence of it. (*p*) The Act does not apply to any contract unless the loan would, independently of the Act, have created the relation of debtor and creditor as distinguished from the relation of partners. (*q*) The effect of sect. 5 is to prevent the lender, with a share of profits, from proving in bankruptcy in competition with any of the creditors, even those whose debts are not connected with the business. (*r*) A person who merely lends money to a firm in partnership to be employed in the business, or who receives interest for money advanced, is not a partner or joint adventurer in the business, as the money is payable at all events, and the right to receive it does not depend upon the contingencies and fluctuations of the trade. (*s*) If a partner withdraws from the firm, leaving a certain amount of capital in the concern, for which he is to receive interest and a terminable annuity, payable at all events, this arrangement will not amount to a perpetuation and continuation of the preceding partnership.

Inchoate and Incomplete Partnerships. — If several persons agree to unite together in partnership, and to raise a joint [* 79] stock, * and one borrows money, and another procures goods, to make up his share of the joint contribution, the one is not liable for the debt contracted by the other, as the partnership is not fully formed, and the partner is not acting in discharge of the ordinary functions of the co-partnership, but on his own private account. (*t*) But as soon as the partnership is

(*m*) *Pooley v. Driver*, 5 Ch. D. 458.

(*n*) See *per* *Ld. Chelmsford*, in *Syers v. Syers*, *supra*.

(*o*) *Ex parte Delhasse*, 7 Ch. D. 511.

(*p*) *Syers v. Syers*, *supra*.

(*q*) *Pooley v. Driver*, 5 Ch. D. 458.

(*r*) *Ex parte Taylor*, 12 Ch. D. 366.

(*s*) *Elgie v. Webster*, 5 M. & W. 518.

(*t*) *Saville v. Robertson*, 4 T. R. 725; *Smith v. Craven*, 1 Cr. & J. 500; *Green-slade v. Dower*, 7 B. & C. 638; *Heap v. Dobson*, 15 C. B. N. s. 460.

in actual operation, and has begun business on the joint account, all those of the intended partners who assent to the commencement of the trading operations for their common benefit, or take an active part in promoting them, become present and complete partners in the undertaking, and impliedly accord to each other all such powers and authorities as are usual and reasonably necessary to enable them to discharge the functions of the co-partnership and carry the common object into effect.

Restrictions upon the Apparent General Authority of one Partner to bind another, made by agreement amongst the partners, are operative only as between the partners themselves, and do not limit the partnership authority as to third persons who acquire rights by its exercise, unless the limitation of authority and liability is established and made known to parties dealing with the firm in the mode presently pointed out. But if goods are supplied to A and B (who are partners) after notice by A that he will not be answerable for any goods subsequently sent, it is incumbent on the plaintiff, in an action for the amount of such goods, to prove some act of adoption on the part of A, or that he has derived benefit from the goods. (*u*)

Dealings by one Partner in Fraud of the Co-partnership.—Every one of the partners is responsible for things done within the scope of their implied authority, although they be done in fraud of the partnership, unless the plaintiff who seeks to charge the co-partnership upon the fraudulent dealing of the single partner was himself a party, or in any way privy, to the fraud. If a simple contract concerning the partnership affairs and business is entered into by one of several partners in the trading name of the firm, or on behalf of the firm, or in his own name without mention of the co-partnership, all the partners are individually liable upon the contract, whether their names do or do not appear upon the face of the written instrument. They stand in the same position as an undisclosed principal who has entered into a simple contract in writing in the name of an agent. (*x*) But this liability * is confined to contracts [*80] made in the execution of the ordinary business of the

(*u*) *Willis v. Dyson*, 1 Stark. 164. *Beckham v. Drake*, 9 M. & W. 97;

(*x*) *Ante*, p. *45; *Trueman v. Loder*, *Drake v. Beckham*, 11 ib. 315.
11 Ad. & E. 594; 2 Smith's L. C. 212;

co-partnership, as one partner is not liable upon the private and particular contracts and engagements of another partner made by him for his own individual benefit alone, and known, or which ought to have been known, by the plaintiff at the time not to be a partnership transaction. (*y*) But a bill accepted in the name of a firm in the hands of a *bona fide* holder is valid against the firm, although the partner who accepted had no authority to do so, and his doing so was fraudulent. (*z*)

In an action by an indorsee against members of a firm on a bill accepted in the name of the firm, upon its being proved that the acceptance was by one of the partners in fraud of the partnership and contrary to the partnership articles, the onus is cast on the holder of the bill of showing that he gave value for it. (*a*)

Transactions out of the Ordinary Course of Business. — If the trading name of the firm, or an adopted or an acquired name, is used in dealings and transactions out of the ordinary scope and business of the co-partnership, such a user of the name will not bind the other partners, unless they have expressly assented thereto. In the case of professional partnerships, for example, where it is not usual or necessary for the purpose of carrying on the trading business of the firm that bills or notes should be made, accepted, or negotiated, one partner has no implied authority to pledge the name and credit of the co-partnership upon bills and notes. (*b*) One joint tenant of a farm “has no power to bind the others by drawing or accepting bills, because it is not necessary or usual for the purpose of carrying on the farming business that bills should be drawn or accepted.” (*c*) Nor can one of two partners bind the other by consenting to a reference or to an order for judgment in an action against himself and his co-partner. (*d*) There is no implication of law from the mere existence of a trade partnership that one partner has authority to bind the firm by opening a banking account on its behalf in his own name. (*e*)

(*y*) *Darlington Joint Stock District Banking Co., ex parte in re Riches*, 34 L. J. Bank. 10.

(*z*) *Wiseman v. Easton*, 8 L. T. N. S. 637.

(*a*) *Hogg v. Skeen*, 18 C. B. N. S. 426; 34 L. J. C. P. 153.

(*b*) *Hedley v. Bainbridge*, 3 Q. B. 316.

(*c*) *Littledale, J.*, 10 B. & C. 138, 139; *Holroyd, J.*, 7 B. & C. 639.

(*d*) *Hambidge v. De La Crouce*, 3 C. B. 715.

(*e*) *The Alliance Bank v. Kearsley*, L. R. 6 C. P. 433; 40 L. J. C. P. 249.

Bills and Notes in the Name of the Firm, given by one of the Partners to secure his own Private Debt, cannot be enforced against the partnership by the party taking the security, (*f*) unless he can show that the partner from whom he took it had the authority of his co-partners to pay his own private debt with the *acceptance of the firm. (*g*) But if the [* 81] bill passes into the hands of a *bona fide* holder, the latter may enforce payment from the firm (if it be a trading firm) without giving any such evidence. (*h*)

Representations and Acknowledgments by Partners touching the partnership business and dealings, made in the ordinary course of business, will bind all the members of the firm as between themselves and third parties who have acted upon the faith of such representations and statements. (*i*)

Liabilities of Dormant and Secret Partners.—Every person who secretly connects himself with a firm in partnership, furnishing capital, labor, and skill, and secretly participating in the profits of the business, stands in the position of an undisclosed principal (*ante*, pp. * 45, * 46) who has contracted in the name of an agent, and is liable in common with the acting and ostensible partners for the performance of the contracts and the satisfaction of the debts and liabilities of the co-partnership, except in the case of bills and notes not drawn or made in the name of the firm. The secret partner may be sued, although the contract is made in the name of one only of the partners, and the firm has not previously recognized any contracts made in his name alone as partnership contracts; (*k*) but the existence of an actual partnership must be proved so as to confer on the one an authority to bind the other. (*l*) The mere concurrence of creditors in an arrangement under which trustees carry on the business of

(*f*) *Shirreff v. Wilks*, 1 East, 51; *Jones v. Yates*, 9 B. & C. 532; *Ridley v. Taylor*, 13 East, 182; *May v. Chapman*, 16 M. & W. 355.

(*g*) *Leverson v. Lane*, 13 C. B. N. S. 278; 32 L. J. C. P. 10. As to whether a reasonable belief by the creditor that the partner had such authority is sufficient, see *Kendal v. Wood*, L. R. 6 Ex. 243, 248; 39 L. J. Ex. 167. It would seem on principle that such belief is not sufficient unless it has been induced by

the acts of the other partners. See also *Hogarth v. Latham*, 3 Q. B. D. 643.

(*h*) *Wiseman v. Easton*, 8 L. T. R. N. S. 637; see *per* Bramwell, L. J., in *Hogarth v. Latham*, *supra*, at p. 648; *Garland v. Jacomb*, L. R. 8 Ex. at p. 219.

(*i*) *Rapp v. Latham*, 2 B. & Ald. 801.

(*k*) *Beckham v. Drake*, 9 M. & W. 97; *Drake v. Beckham*, 11 ib. 315.

(*l*) *Kilshaw v. Jukes*, 3 B. & S. 847; 32 L. J. Q. B. 220.

their debtor for their benefit, and for the purpose of dividing the profits of the trade amongst them, does not make them partners. (*m*)

Private Agreements between Parties exempting Dormant Partners from Liability. — The liability of persons who have participated as principals in the joint speculations and contingent profits of a partnership or joint adventure cannot, as we have seen (*ante*, p. *79), in any way be controlled or affected by the secret contracts of the joint adventurers *inter se*. If, therefore, the joint adventurers expressly agree not to be partners *inter se*, such an agreement cannot in any way affect their position as regards the public. If several partners or joint adventurers in a particular trade or business agree that the trade shall be carried on by one or more of them in their own names as the [* 82] ostensible and acting partners, and that * certain secret partners who contribute capital, skill, or labor to the joint stock of the partnership shall not be liable for losses beyond a certain amount, the operation of the agreement is confined to those who are parties to it, and cannot affect the liability of such secret partners as regards the public and third persons, unless the limitation of liability is established and made notorious, in the mode presently pointed out (*post*, p. *104). And it matters not whether the party participates in and receives, or bargains for, a share in the accruing profits for his own benefit, or as a trustee or executor for others. Equally indifferent is it whether his share be large or small. (*n*)

Liabilities of Nominal Partners.¹ — Persons may become clothed with the legal liabilities and responsibilities of partners as regards the public and third parties, by holding themselves out to the world as partners, as well as by contracting the legal relationship of partners *inter se*. When the question is not between the parties themselves as to what shares they shall divide, but respecting creditors claiming a satisfaction out of the funds of a particular house as to who shall be deemed liable in regard

¹ See *ante*, p. *76, American note 1.

(*m*) *Cox v. Hickman*, 9 C. B. N. S. 47; 30 L. J. C. P. 125; 8 H. L. C. 268; 412.
R. Stanton Iron Co., 21 Beav. 172; 25 L. J. Ch. 142.

to those funds, the sense or understanding of the parties themselves *inter se*, that they shall not be partners, will be of no avail, and will not affect the existence of the partnership so far as regards the public at large. "If a man will lend his name as a partner, he becomes as against all the rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them." (o)

Persons suffering themselves to be held out to the World as Partners or members of a particular firm, by permitting their names to be used in the business or exhibited over a shop-window, or to be written in invoices or prospectuses, or to be published in advertisements as the names of members of the firm, are chargeable as partners, although they are not in point of fact partners, and have no share or interest in the business. (p) But it must appear that the partnership was actually formed and in operation, and was not merely a projected joint adventure. (q) If a person holds himself out to the world as a partner with another in a particular line of business only, he does not thereby render himself liable as a partner in other transactions not within the course of that * business. (r) And if a [* 83] plaintiff has contracted with a firm in partnership, knowing at the time that the defendant, whose name appeared in the name of the firm as an ostensible partner, was not in fact a partner, and had no share or interest in the partnership, he cannot afterwards make the defendant responsible upon the contract which he entered into with notice of that fact. (s) If a man's name is used without his knowledge and consent, he cannot be made responsible as a partner upon the strength of such false representation. (t) A man may, however, be fixed with the liabilities and responsibilities of a partner through the medium of his own express admissions or representations; (u)

(o) Eyre, C. J., *Waugh v. Carver*, 2 H. Bl. 246; 1 Smith, 502, 503.

(p) *Guidon v. Robson*, 2 Campb. 304.

(q) *Bourne v. Freeth*, 9 B. & C. 640, 641.

(r) *De Berkon v. Smith*, 1 Esp. 29.

(s) *Alderson v. Pope*, 1 Camp. 403, n.

(t) *Fox v. Clifton*, 4 M. & P. 713.

(u) *Parke, J., Dickinson v. Valpy*, 10 B. & C. 140; *Ld. Kenyon*, 1 Esp. 30.

but a plaintiff seeking to found an action upon them must prove that he knew of, and acted upon, such statements and representations, and dealt with and credited the firm, under the belief that they were true. (x) No mistaken supposition of a party as to his being a partner will make him liable as such, unless it were communicated to the plaintiff so as to mislead him. (y)

Liabilities of Incoming and Retiring Partners. — An incoming partner cannot be made responsible for the non-performance of contracts entered into by the firm before he became an actual or reputed member of it. He cannot, for instance, be made responsible upon bills or notes accepted or made by his co-partners before he became a member of the firm; but if a bill be accepted on account of a debt which was incurred partly before and partly after such partner joined the firm, he is liable for so much of the debt for which the bill was accepted as accrued subsequently to his accession to the partnership. (z) An incoming partner cannot be charged with the payment of the price of goods sold to the co-partnership before he became a member of it, although they may have been delivered subsequently thereto. (a) “When a banking firm,” observes Parke, B., “makes payments professedly on account of a customer without his authority, and those payments are entered to the debit of the customer in the books of the firm, parties who afterwards become partners in that firm are not to be considered as agreeing to impose upon themselves a liability for anything more than that which by the books themselves, which are handed over to the new firm, appears to be due to the customer. In order to render the new firm liable for the amounts which do not so appear upon the books, it is necessary to show that the old firm have ceased to be liable and [* 84] are discharged; and * in order to do so you must show an agreement between the old and the new firm and the customer, that the new firm is to be considered as substituted as the debtor in lieu of the old for the amount sought to be recovered. There may be cases in which the new firm agrees to become liable for the actual, not the apparent, balance.” (b) The

(x) *Carter v. Whalley*, 1 B. & Ad. 14.

(y) *Vice v. Lady Anson*, 7 B. & C. 411.

(z) *Wilson v. Lewis*, 2 Sc. N. R. 118.

(a) *Wilson v. Bailey*, 9 Dowl. 20;

Whitehead v. Barron, 2 M. & Rob. 248.

(b) *Craufurd v. Cocks*, 6 Exch. 291.

transfer of the accounts from the old to the new firm, and the acceptance by the creditor of a new simple contract security from the new firm for the debt due to him, is not of itself sufficient to discharge a retiring partner. There must be an agreement, either express or fairly to be inferred, to discharge the old firm. (c) Two bankers, partners, gave deposit notes to depositors who, when the amounts on deposit were increased or diminished, gave up their old notes and received fresh ones. Two other partners were admitted, and notice given to the depositors. The first two partners died, and the depositors knew it, and made no claim against their estates. The business was carried on under the old name by the new partners, and the depositors received interest from them. Some retained their old notes, and some took fresh ones. The new partners being bankrupt, the depositors proved for the amounts due on their notes as money "advanced and lent" to the bankrupts. It was held that there was a complete novation, and that none of the depositors were entitled to prove against the old firm. (d) Where a firm was newly constituted, but no alteration was made in the mode of carrying on the business, and the accounts were continued in the old books as if no change had taken place, and the existing liabilities were discharged or diminished either from the assets of the old firm or from the funds of the new firm indiscriminately, it was held that this was cogent evidence that the new firm had assumed the liability to pay the debts of the old firm. (e) Where creditors of the old firm know that the new firm has arranged to assume the debts of the old firm, and go on dealing and receive payment of part of the debt out of the blended assets of the old and new firms, such creditors thereby discharge the old firm, and accept the new firm as their debtor. (f)

Notice of Retirement of Partners, and of the Dissolution of the Co-partnership. — If once a person holds himself out as being a partner, till he gives notice that he has ceased to be so, those who deal with the firm upon the faith of the supposed partner-

(c) *Harris v. Farwell*, 15 Beav. 31; *Brown v. Gordon*, 22 ib. 68; *Kirwan v. L. R. 1 P. C. 27*; 35 L. J. C. P. 13.
Kirwan, 2 Cr. & M. 617. (f) *Bank of Australasia v. Flower*,

(d) *Bilborough v. Holmes*, 5 Ch. D. L. R. 1 P. C. 27; 35 L. J. C. P. 13.
 255.

ship may consider him as a partner, and he is bound by that representation. (*g*) The retirement of an ostensible [* 85] partner ought to be * made as notorious as the fact of his connection with the firm. A notice in the *London Gazette* is insufficient, unless there is a reasonable presumption that the paper has been seen and read by the parties dealing with the firm. "Many people there are who never see a Gazette to the day of their deaths; and very mischievous would be the consequences if they were bound by a notice inserted in it." (*h*) And even if the advertisement is inserted in a paper which a plaintiff who is suing a retired partner is in the habit of reading, the insertion, unless it has been frequently repeated, is of itself very meagre evidence of the plaintiff's knowledge of the fact. (*i*) The only certain and secure way of putting an end to the continuing liability is to insert frequent advertisements of the retirement of the partner in all the papers having the greatest circulation in the immediate neighborhood of the place where the business of the co-partnership is carried on, and to send express notice to every person residing at a distance who has been in the habit of dealing with the partnership during the time that the retiring partner was a member of the firm. (*k*)

Retirement of Dormant Partners. — Dormant and secret partners may release themselves from all further liability by a simple relinquishment of their share in the profit and loss of the business. They continue responsible upon all executory contracts and transactions in actual operation at the time of their withdrawal; but they are not liable upon the subsequent contracts of the firm and the debts and liabilities incurred after their retirement. (*l*) But if they are not strictly secret as well as dormant partners, notice of the termination of their connection with the co-partnership must be given. (*m*)

When a partnership or trading association is under the management of trustees or directors, the common law power of one

(*g*) *Goode v. Harrison*, 5 B. & Ald. 157.

(*h*) *Ld. Kenyon, Graham v. Hope, Peake*, 208.

(*i*) *Jenkins v. Blizard*, 1 Stark. 420.

(*k*) *M'Iver v. Humble*, 16 East, 169; *Newsome v. Coles*, 2 Campb. 617; *Hart*

v. Alexander, 2 M. & W. 490; *Barfoot v. Goodall*, 3 Campb. 148; *Lacy v. Woolecott*, 2 D. & R. 460.

(*l*) *Carter v. Whalley*, 1 B. & Ad. 11.

(*m*) *Farrar v. Deslinne*, 1 C. & K. 580.

partner to bind another existing in ordinary trading partnerships ceases, and notice to a party that there are trustees or directors is notice to him that he is not dealing with an ordinary partnership. (n) The shareholders or partners are liable only upon contracts made by the trustees or directors in the ordinary course of business, in the same manner as dormant partners in any ordinary partnership. But no private agreement between the shareholders and directors, restricting the apparent general authority of the latter to bind the former by their contracts, or qualifying and limiting the liability of the shareholders upon such contracts, will be of any avail as

* against the claims of creditors of the partnership who [* 86] have dealt with the directors in ignorance of the particular limitations and restrictions placed upon their apparent general authority. (o)

Authority of Committeemen.—Where a review was established by an association of shareholders, who passed certain written resolutions for its regulation and management, and appointed a committee of shareholders “to assist the editor in promoting the prosperity and circulation of the review, and to obtain literary contributions,” it was held that this resolution did not empower one of the committee to contract with any person for the supply of literary articles, or to bind the shareholders to pay for them when supplied and inserted in the review. (p)

Liabilities of Partners upon Deeds.¹—In order to make a partner liable upon a deed, it must be shown that he actually

¹ The leading rules indicated by the earlier American cases are : that the partnership relation does not confer implied authority on a partner to bind his fellows by a sealed instrument, but that he may do so under a special authority, which may either be given expressly or inferred from circumstances ; and that a sealed instrument executed by one partner will bind him and any other partner present and consenting, or who may afterwards ratify, even though a single seal only is used. See cases cited U. S. Dig. tit. *Partnership*, § 792.

Recent cases are : A deed executed by one partner in the name of the firm is not valid at common law, but if executed with the consent of the firm, or if they

(n) Parke, B., *Hallett v. Dowdall*, 21 709; *Rex v. Dodd*, 9 East, 527; *Walburn v. Ingilby*, 1 M. & K. 76.

(o) *Hawken v. Bourne*, 8 M. & W. (p) *Heraud v. Leaf*, 17 L. J. C. P. 57.

sealed and delivered the deed in person, or that it was done by another for him, in his presence and by his commandment; (*q*) or, if executed by one partner on behalf of the firm generally as the deed of the partnership, it must be shown that the partners sued upon it authorized their co-partner to execute the deed by a power of attorney under seal, and the authority under seal, when it exists, must be produced and proved. (*r*) Where one of two partners caused a bond to be made out in the name of the firm, "Davis and Marsh," and sealed and delivered it as the deed of the partnership, it was held that it could not bind the other partners, as they had given their co-partner no authority under seal to enter into and execute deeds in their behalf, or on behalf of the firm. (*s*) But the bond, being joint and several, would bind the partner who signed it; (*t*) and a deed purporting to be made by all the partners of the firm, and only signed by one, binds that one, although the other partners afterward decline

afterwards ratify it, the courts will enforce the contract. *Baldwin v. Richardson*, 33 Tex. 16; see also *Walton v. Tusten*, 49 Miss. 569.

A sealed note in the name of the firm, made by one partner, is not a satisfaction of the firm debt unless accepted as the individual note of the partner. *Hoskinson v. Eliot*, 62 Pa. St. 393.

A bond executed in the firm name by an individual partner in the name of the firm may become obligatory on the others by estoppel or ratification, irrespective of any objection that one partner cannot bind his firm by seal. *Mann v. Aetna Ins. Co.*, 40 Wis. 549. s. p. of a chattel mortgage. *Richardson v. Lester*, 83 Ill. 55.

Either member of a partnership may secure one of its creditors by a transfer of property; and this may be done by an assignment in the nature of a mortgage, executed in a firm name under seal, with a trust to account for and repay the surplus, if any. *McClelland v. Remsen*, 3 Abb. App. Dec. 74; *Morrison v. Mendenhall*, 18 Minn. 232.

A general assignment under seal of the partnership assets for the benefit of the creditors will bind a partner executing it and one who has assented to it (*Richardson v. Lester*, 83 Ill. 55; *Brooks v. Sullivan*, 32 Wis. 444), or who ratifies it afterwards (*Holland v. Drake*, 29 Ohio St. 441), but not one who was not consulted and has never assented (*Dunklin v. Kimball*, 50 Ala. 251; *Brooks v. Sullivan*, 32 Wis. 444), unless he had absconded; absconding may be deemed to imply his consent (*National Bank v. Sackett*, 2 Daly, 395).

Whether a partner's affixing a seal to an instrument which does not require a seal will impair its validity as a simple contract, see *Woodruff v. King*, 47 Wis. 261; *Schmertz v. Shreeve*, 62 Pa. St. 457.

(*q*) *Ball v. Dunsterville*, *ante*, p. * 20.

(*s*) *Elliott v. Davis*, 2 B. & P. 338.

(*r*) *Steiglitz v. Egginton*, Holt, N. P.

(*t*) *Elliott v. Davis*, *supra*.

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to sign it. (u) A general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose. (v)

Of Corporations Aggregate. — The effect of a general and unqualified incorporation of two or more persons, at common law, is to create an aggregate body politic, or legal entity, with rights and liabilities completely separate and distinct from the individual existence, rights, and liabilities of its members.

This legal entity * is, as it has been sagely remarked, [* 87] without soul or conscience, and without any visible or

outward form, and cannot, therefore, be either excommunicated, or outlawed, or arrested. It could only in former times be compelled to answer in an action at law by a *distringas* against its goods and chattels, and could only appear by attorney appointed under its common seal ; and if it had neither lands nor goods, there was no way of bringing the corporate body either into a court of law or a court of equity. Its debts are, at common law, its own debts, and not the debts of the individual members thereof ; and the latter, consequently, are not answerable either in their persons or property for the corporate debts ; and if there are no corporate effects whereon to levy judgments and executions obtained against the body corporate, the creditors must go unpaid. (x) Amongst the powers and privileges possessed by the body corporate from the mere act of incorporation, and without any special provision or stipulation in the charter, is the power of making by-laws for the government of the body politic, subject to the laws of the realm and subordinate thereto (y), and the power (in the case of ancient corporations) of electing its own members at corporate meetings, and appointing its own officers ; of suing and being sued in the corporate name ; of holding and enjoying property in such name ; of purchasing and parting with its possessions ; of compromising claims against it ; (yy) and of acting and speaking through a common seal, which is said to be “its hand and mouth-piece.”

(u) *Bowker v. Burdekin*, 11 M. & W. 128; *Cumberledge v. Lawson*, 1 C. B. N. S. 709.

(v) *Harrison v. Jackson*, 7 T. R. 210.

(x) Bro. Abr. fol. 183–186; fol. 265, pl. 82; *Edmunds v. Brown*, 1 Lev. 237.

(y) *Reg. v. Wood*, 5 Ell. & Bl. 49.

(yy) *Bath's case*, 8 Ch. D. 334; *Hesketh's case*, 13 Ch. D. 693.

Corporations cannot lawfully purchase or hold lands without the license of the crown or the authority of parliament; (z) and they cannot, consequently, lawfully enter into or enforce real contracts concerning lands without a license or authority to hold lands.

Contracts with Corporations.¹—All contracts of importance entered into by corporations must, with some exceptions presently noticed, be made under the common seal of the body corporate, and in the corporate name. If the contract is made in

¹ The ancient rule requiring a seal has been gradually relaxed, and now business corporations may by mere vote or other corporate act not under seal create agents whose acts and contracts, within their authority, bind the corporation; promises of such an agent operate as promises of the corporation, and from his acts implied promises may be raised against the corporation. *Fleckner v. Bank of U. S.*, 8 Wheat. 338; *Fanning v. Gregoire*, 16 How. 524; *Frankfort Bridge Co. v. Frankfort*, 18 B. Mon. 41; *Lee v. Flewingsburg*, 7 Dana, 28; *Commercial Bank v. Newport Manuf. Co.*, 1 B. Mon. 13. Unless its charter distinctly restricts it, a corporation may be bound by a simple or parol contract, or by a vote of its trustees provable only by parol (*Abby v. Billups*, 35 Miss. 618; *McCullough v. Talladega Ins. Co.*, 46 Ala. 376); or by a contract made without authority of a formal vote (*Lime Rock Bank v. Macomber*, 29 Me. 564; *Eastman v. Coos Bank*, 1 N. H. 23); or by an implied contract deduced from corporate acts or from acts of its agents authorized, permitted, or ratified by the general direction (*Bank of Columbia v. Patterson*, 7 Cranch, 299; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Bank of Metropolis v. Guttschlick*, 14 Pet. 19; *Fanning v. Gregoire*, 16 How. 524; *Bradstreet v. Bank of Royalton*, 42 Vt. 128; *Maher v. Chicago*, 38 Ill. 266; *Abbot v. Third School District in Hermon*, 7 Me. 118; *New York, &c. R. R. Co. v. New York*, 1 Hilt. 562). Indeed, contracts which a corporation has power to make may generally be made in the same manner as a natural person might make them, so far as the necessity of a seal is involved. *Savings Bank v. Davis*, 8 Conn. 191; *New Athens v. Thomas*, 82 Ill. 259; *Hamilton v. New Castle, &c. R. R. Co.*, 9 Ind. 359; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Peterson v. New York*, 17 N. Y. 449; *Watson v. Bennett*, 12 Barb. 196; *Blunt v. Walker*, 11 Wis. 334. But this liberal doctrine is subject to the obvious qualification, that express restrictions laid by the charter on the power of contracting, or the mode of doing so, will be enforced. *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *St. Andrew's Bay Land Co. v. Mitchell*, 4 Fla. 192. There must, however, be express restriction or prohibition; it will not follow, because the corporation is authorized to contract in a specified manner, that it cannot bind itself in another manner. *Paine v. Stewart*, 33 Conn. 516; *Merchants' Bank v. Central Bank*, 1 Ga. 418; *Carey v. McDougald*, 7 Ga. 84; *Topping v. Brickford*, 4 Allen, 120; *Dana v. Bank of St. Paul*, 4 Minn. 385; *Safford v. Wyckoff*, 4 Hill, 442; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Barnes v. Ontario Bank*, ib. 152; *Leavitt v. Blatchford*, 5 Barb. 9; *Neiffer v. Bank of Knoxville*, 1 Head, 162; *Constant v. Allegheny Ins. Co.*, 1 Am. L. Reg. N. s. 116; but see *McSpedon v. New York*, 7 Bosw. 601. That the relaxation of the rule requiring a seal does not extend to municipal corporations, see *San Antonio v. Gould*, 34 Tex. 49. See full note, 21 Am. L. Reg. N. s. 103.

(z) Co. Litt. 92 a, 2 b.

the name of the head of the corporation, or in the names of the individual members thereof, the corporate body cannot in general sue or be sued upon the contract, although the common seal has been affixed to it. (a) If a covenant is made with a corporation by name, it is sufficient if the name and description inserted in the deed are "the same in substance with the true name; it need not be the same in words or syllables;" (b) for whenever there is in truth but one and the same corporation, contracts made with them ought not to be avoided by nice and verbal variances, when it plainly appears what was the *true name of the corporation. And there is a [* 88] difference between ancient corporations and corporations made of late times; for ancient corporations may by usage have divers and several names, and leases, grants, &c., by any of them will be good enough. (c) If, moreover, a corporation adopts any particular name or seal different from its true name or seal, and uses it in making contracts, it may be estopped from showing that the name and seal so adopted and used are not its true name and seal. (d)

Want of Mutuality of Obligation. — If an executory simple contract, founded upon mutual promises and a mutuality of obligation and liability, is not binding upon a corporation by reason of its not being under the seal of the body corporate, it cannot be enforced by the corporation by reason of the absence of reciprocity or mutuality of obligation and liability. (e)

Infancy in the mayor, bailiff, or other head of a corporation, or any incapacity to contract on the part of individual members thereof, do not in any way affect the rights and liabilities of the corporation in respect of corporate acts. (f)

An act done by the members of a municipal corporation in the absence of the head is not the act of the corporation. Thus, if a bond be given by the commonalty in the absence of the mayor, the body corporate is not bound. But if a mayor *de facto*,

(a) Bro. Abr. *Corporations*, pl. 31; 15 E. 4, 1; Com. Dig. *Franchises*, F. 19.

(b) *Rex v. Haughley*, 4 B. & Ad. 655; *Sidney Sussex College v. Davenport*, 1 Wils. 184; *Croydon Hosp. v. Farley*, 6 Taunt. 467.

(c) *Mayor, &c. of Lynne*, 10 Co. 123, a.

(d) *Elliott v. Davis*, 2 B. & P. 338.

(e) *Copper Miners of England v. Fox*, 20 L. J. Q. B. 176; 16 Q. B. 229.

(f) 1 Kyd, 312; *Rex v. Carter*, 1 Cowp. 225; Bro. Abr. *Corporations*, 63.

together with such other members of the corporation as are empowered to bind the whole by their act, put the common seal to an obligation, this shall bind the corporation, though he be not *de jure* mayor; for, being in fact appointed to the office, and permitted to act in it by the corporation, who might have removed him, all judicial and ministerial acts done by him are valid. Generally speaking, all corporations are bound by a covenant under their corporate seal, properly affixed, as much as an individual is by his own deed. But where corporations are created by act of parliament for particular purposes, with special powers, then their deed, though under their corporate seal, regularly affixed, will not bind them, if it plainly appears that the deed is *ultra vires*. (g) If the common seal has not been affixed to the contract, the general rule is that the contract is not the contract of the corporation, but of the individual members concerned in the making of it, who can alone sue and be sued thereon. (h) But this rule has been subjected to numerous exceptions, and has been almost superseded in practice in the case of trading corporations, the end and object of whose existence could [* 89] * never be accomplished if every corporate act was required to be authenticated under the common seal.

Implied Contracts with Corporations.¹—If a person has had the benefit of the fulfilment of a contract which could not have been enforced against a corporation whilst it remained executory, the law will raise an implied promise in its favor, upon which it may sue in its corporate character. (i) Where, for example, a party has enjoyed all the benefit and advantage of a parol contract entered into with a corporation, he will not be permitted to discharge himself from the ordinary liability on the ground that the contract was not entered into under the common seal of the corporate body. (k) A municipal corporation, therefore, may

¹ See *ante*, p. * 87, American note 1.

(g) *Payne v. Mayor of Brecon*, 3 H. & N. 579.

(h) Bro. Abr. *Corporations*, pl. 47, 49, 50, 56, 63; 1 Roll. Abr. 514.

(i) *Beverley v. Linc. Gas Co.*, 6 Ad. & E. 839; 2 N. & P. 283; Aust. R. M.

St. N. Co. v. Marzetti, 11 Exch. 228; 24 L. J. Ex. 273.

(k) *Fishmongers' Co. v. Robertson*, 5 M. & Gr. 192; *Liverpool Borough Bank v. Eccles*, 4 H. & N. 139; 28 L. J. Ex. 122; *Melbourne Corp. v. Brougham*, 4 Ap. Cas. 156.

sue for the use and occupation of tolls not granted to the occupier under the common seal; (*l*) and for the use and occupation of houses and lands, the property of the corporation, where the tenant has actually occupied and taken and enjoyed the profits of the land. (*m*) And one who enters upon, occupies, and pays rent for corporate property under a demise for a term of years made on behalf of the corporation, but not sealed with their common seal, becomes tenant from year to year of the corporation, on such terms of the demise as are applicable to a yearly tenancy, (*n*) and the corporation may distrain for the rent. (*o*) The corporation is in like manner responsible upon the ordinary implied promise in respect of the use and occupation of houses and lands, during the period it actually occupied, (*p*) but no longer, as it cannot be bound by an executory contract for an interest in land not made under its common seal. (*q*) So if there has been part performance of a contract for a lease by a corporation, specific performance will be decreed, though the contract was not under the corporate seal. (*r*)

Where the unsealed contract is of such a nature as to be the subject of an action for specific performance, and such contract has been in part performed under circumstances which render the equitable doctrines of part performance applicable, the contract will bind the corporation; but in other cases it is extremely doubtful whether the mere fact that a contract, not otherwise * binding upon the corporation, has been [* 90] wholly or partly performed, renders the corporation liable to be sued either on the contract or on a *quantum meruit*. (*s*)

A corporation with a head, such as a municipal corporation, may also transact trifling matters of business, and enter into

(*l*) *Mayor, &c. of Carmarthen v. Lewis*, 6 C. & P. 608.

(*m*) *Dean, &c. of Rochester v. Pierce*, 1 Campb. 466; *Mayor of Stafford v. Till*, 12 Moore, 260; 4 Bing. 77; Vin. Abr. *Corporations* (K) p. 41.

(*n*) *Ecclesiastical Commissioners v. Merral*, L. R. 4 Ex. 1621; 38 L. J. Ex. 93.

(*o*) *Wood v. Tate*, 2 B. & P. N. R. 247.

(*p*) *Lowe v. London & N. W. Ry. Co.*, 18 Q. B. 362; 21 L. J. Q. B. 361.

(*q*) *Finlay v. Brist. & Ex. Ry. Co.*, 7 Exch. 416; 21 L. J. Ex. 117.

(*r*) *Steeven's Hospital v. Dyas*, 15 Ir. Ch. R. 405; *Crook v. Corporation of Seaford*, L. R. 10 Eq. 680; ib. 6 Ch. 551.

(*s*) *Hunt v. Wimbledon Local Board*, 3 C. P. D. 208, *per* Lindley, J., where the authorities are collected; and s. c. in C. A.; 4 C. P. D. 48. See also *Young v. Corporation of Leamington*, 8 Q. B. D. 579. Agent appointed under seal made a contract not under seal; held not binding.

such ordinary contracts as are of constant recurrence, and the making of which forms part of its customary and usual functions, without the employment of its common seal. It may hire the ordinary servants of the corporation, such as a butler, cook, bailiff, &c., and may contract for the purchase of trifling articles without deed. "If the head of a corporation, by the intervention of a servant, buys certain things for the use of a corporation, which are actually applied to their use, they are bound by this contract, and an action may be maintained against them after the change of the head in whose time the purchase was made. So if the regular servant of the corporation make a purchase, and apply it to the use of the corporation, it would seem that the corporation is bound." (*t*) Where the head of a municipal corporation gave an oral order for weights and measures, which were sent to him, and were afterwards examined at the town-hall, at a full meeting of the corporation, and approved, accepted, and used by the corporate body, it was held that the corporation was responsible for the price of the goods so ordered. (*u*) So a contract for the admission of a ship into a dock for repairs has been held not to require a seal. (*v*) If a municipal corporation has wrongfully got possession of the money of a stranger, or the money of one of its own members, the law raises an implied promise from the corporate body to refund the amount, just the same as in the ordinary case of the receipt of money by a private individual which the latter has no right in conscience or equity to retain. (*x*) But in all matters of consequence and importance, and in respect of acts and contracts not coming within the scope of its ordinary every-day functions, the corporation is not bound by the act done, unless it is a corporate act authenticated by writing under the common seal. (*y*)

At a meeting of the town council of a municipal corporation, a resolution was entered in the corporation books to the effect that the salary of the town clerk should be increased; but it

(*t*) 1 Kyd, 313, 314, citing *Longo Quinto* (Ed. 4), 70-74.

(*u*) *De Grave v. Mayor, &c. of Monmouth*, 4 C. & P. 111.

(*v*) *Wills v. Kingston-upon-Hull*, L. R. 10 C. P. 402.

(*x*) *Ld. Denman, Hall v. Mayor, &c. of Swansea*, 5 Q. B. 517; 13 L. J. Q. B. 112.

(*y*) *Mayor, &c. of Ludlow v. Charlton*, 6 M. & W. 815.

was held * that the corporate body was not bound by this [* 91] resolution, as it had not been made under the common seal. (z) So where the London Dock Company accepted, by parol through their clerk, a tender by a contractor to cleanse the docks for a year for a certain sum, and the contractor refused to fulfil his engagement, it was held that the company could not enforce the contract, as the offer had not been accepted under their common seal. (a) And where the guardians of a union, a corporate body by statute, entered into a contract under their common seal with the plaintiff for the making of a survey and map of one of the parishes in the union, which contract was duly fulfilled, and subsequently, in consequence of a reduced plan being directed to be made, the plaintiff prepared an outline map on a reduced scale, which was received and used by the guardians, but no contract was entered into by them under their common seal to pay the price thereof, it was held that they were not responsible in their corporate capacity for the payment of this outline map, inasmuch as the preparing of a plan in order to have a parochial assessment made was no part of the duty of the guardians, and was not essential for the carrying out of the purposes or objects for which they were incorporated. (b) So the contract for the engagement of a clerk to the master of a workhouse by a board of guardians must, in order to bind the guardians and render them liable for a wrongful dismissal, be under their seal. (c) But where iron gates and water-closets were made and erected at the union workhouse, pursuant to an oral order given by the guardians, it was held that the guardians were responsible in their corporate capacity for the payment of the price of them, as they were necessary for carrying out the purposes for which the guardians were incorporated; and it was laid down as a general rule of law by the Court of Queen's Bench, that wherever the purposes for which a corporation is created render it necessary that work should be done and goods supplied to carry such purposes into effect, and

(z) *Reg. v. Mayor, &c. of Stamford*, 6 Q. B. 433. As to orders for the payment of money out of the borough fund, see *The Queen v. Mayor, &c. of Warwick*, 15 L. J. Q. B. 306.

(a) *London Dock Co. v. Sinnot*, 1 Ell. & Bl. 347; 27 L. J. Q. B. 129.

(b) *Paine v. Guard. Strand Un.*, 8 Q. B. 326; 10 Jur. 308; *Lamprell v. Billericay Un.*, 3 Exch. 307; *Smart v. Westham Un.*, 10 Exch. 875; 24 L. J. Ex. 201.

(c) *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91.

orders are given at a board regularly constituted, and having general authority to make contracts for such work or goods, and the work is done and the goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit and refuse to

pay, on the ground that, though the members of the corporation who ordered the goods or work were * competent to make a contract and bind the rest, the formality of a deed or the affixing the seal were wanting. (d) Where, therefore, a corporation employed the plaintiff as an accountant to go through its books and audit its accounts, it was held that the services rendered were essential to the accomplishment of the purposes for which the corporation was created, and that the corporation was responsible upon an implied contract for remuneration. (e) So where the plaintiff supplied coals from time to time to the defendants, the guardians of a poor-law union, for the use of their workhouse, under articles of agreement executed by the plaintiff, but not under the seal of the defendants, it was held that, as the goods were such as must necessarily be from time to time supplied for the very purposes for which the defendants were incorporated, they were liable to pay for the coals, although the contract was not under seal. (f)

“The appointment of an attorney to conduct important suits affecting the rights and property of a municipal corporation must in general be under seal, except in the case of the City of London, who appoint an attorney by warrant of attorney in the Queen’s Bench every year, without either sealing or signing, and are estopped by the record to say it is not their act.” (g) Corporations remain always the same as to debts and rights, so that if an old corporation is incorporated by a new name, it may recover in its new name debts contracted with the old corpora-

(d) *Sanders v. Guard. St. Neots*, 8 Q. Un., El. Bl. & El. 873; 28 L. J. Q. B. B. 810; 15 L. J. M. C. 104; *Clarke v.* 66.

Cuckf. Un., 1 Bail. C. C. 85; 21 L. J. (f) *Nicholson v. Bradfield Guardians*, Q. B. 349; *Henderson v. Austral. St. L. R. 1 Q. B. 620*; 7 B. & S. 747; 35 Nav. Co., 5 Ell. & Bl. 409; 24 L. J. Q. L. J. Q. B. 176.

B. 322; *Reuter v. Elect. Tel. Co.*, 6 Ell. (g) *Mayor of Thetford’s case*, 1 Salk. 192; 3 Salk. 103; 2 Raym. 848; *Arnold v. Mayor of Poole*, 5 Sc. N. R. 776; & Bl. 341; 26 L. J. Q. B. 46.

(e) *Haigh v. Guard. North Brierly* 4 M. & Gr. 860.

tion. (*h*) A corporation revived by a new charter has all its rights revived and put in action, and is entitled to the credits of the old corporation, and may therefore sue on a bond given to the old corporation. Where a corporation is created by an act of parliament for particular purposes and with special powers, its deed, though under the corporate seal regularly affixed, does not bind it, if it plainly appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*, that is, that the legislature meant that such a deed should not be made. (*i*) But a corporation is fully capable of binding itself by any contract, except where the statutes by which it is created or regulated, expressly or by * necessary implication, prohibit such contract between the parties. (*k*)

Contracts with Trading Corporations.¹—Where corporations “have been established for the purpose of carrying on trading speculations, and the nature of their constitution has been such as to render the drawing of bills, or the making of any particular sort of contracts, necessary for the purposes of the corporation, the courts have held that they would imply, in those who are, according to the provisions of the charter or act of parliament, carrying on the corporation concerns, an authority to do those acts without which the corporation could not subsist,” (*l*) and to do which it was expressly called into existence. The wants and necessities of a body incorporated for the purposes of trade are, of course, materially different from those of an institution estab-

¹ The English rule, that a “general manager” of a railroad has implied authority to call a surgeon or physician to heal a person injured on the road, seems disapproved in New York (*Stephenson v. N. Y. &c. R. R. Co.*, 2 Duer, 341), but has been applied in Illinois to an order given by a “general superintendent” (*Cairo, &c. R. R. Co. v. Mahoney*, 82 Ill. 73); while as to station agents and conductors, the opinion seems to be that some proof must be made that they had authority (*Tucker v. St. Louis, &c. Ry. Co.*, 54 Mo. 177; *Cooper v. N. Y. Central R. R. Co.*, 6 Hun, 276), but that slight evidence of special authority is sufficient (*Cairo, &c. R. R. Co. v. Mahoney*, 82 Ill. 73; *Indianapolis, &c. R. R. Co. v. Morris*, 67 Ill. 295).

(*h*) *Mayor, &c. of Scarborough v. Butler*, 3 Lev. 237; 7 Q. B. 339.

(*i*) *Parke, B., South York Ry. Co. v. Gt. Northern Ry. Co.*, 22 L. J. Ex. 314; 9 Exch. 84.

(*k*) *Scottish North-Eastern Ry. Co. v. Stewart*, 3 Macq. H. L. C. 382.

(*l*) *Mayor of Ludlow v. Charlton*, 6 M. & W. 821; *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463; *ib.* 4 C. P. 617; 38 L. J. C. P. 338.

lished for municipal purposes and the government of towns and colleges, or local boards or urban authorities; (*m*) and if a trading corporation were unable to contract in the ordinary course of its trade, except under the common seal, its usefulness for trading purposes would be destroyed, and it would be utterly unable to accomplish the object of its existence. It has been held, therefore, that a trading corporation may maintain actions for goods sold and delivered in the usual course of its trade, and may sue upon executory contracts for the supply of goods, for the manufacture and supply of which the company was incorporated, or for the non-acceptance of goods sold and the non-delivery of goods purchased by the corporation. (*n*) It may also draw and accept bills of exchange and promissory notes. (*o*)

Contracts by the officers of trading corporations are not binding upon the corporation, unless they are within the scope of their regular employment. (*p*) A station-master, guard, or clerk of an incorporated railway company, for example, has no implied authority to employ surgeons and procure medical attendance for injured passengers; (*q*) but the company are liable where their credit is pledged for such services by the general manager. (*r*) A clerk charged with the payment of wages,

[* 94] or a secretary or law agent of a company, has no power to bind the company by statements or representations, acts or proceedings, beyond the limit of his ordinary duties and the scope of his regular employment. (*s*) Where a contract for the performance of work and the supply of materials was entered into under the common seal, and extra work, not included in the contract, was performed, it was held that the

(*m*) *Hunt v. Wimbledon Local Board*, 3 C. P. D. 48, C. A.; see also the case of *Eaton v. Baker*, 7 Q. B. D. 529, where under the Public Health Act, 1875, s. 200, a contract which was intended to be under £50 turned out more, and it was held not necessary to be under seal.

(*n*) *City of Lond. Gas Co. v. Nicholls*, 2 C. & P. 365; *Church v. Imp. Gas Co.* 6 Ad. & E. 859; 3 N. & P. 37; *East Ind. Co. v. Glover*, 1 Str. 612; *Gibson v. East Ind. Co.*, 5 Bing. N. C. 270, 271.

(*o*) *R. v. Bigg*, 3 P. Wms. 419; *Edie c. East India Co.*, 2 Burr. 1216.

(*p*) *Williams v. Chester & Holyhead Ry. Co.*, 15 Jur. Ex. 828; *Cope v. Thames Nav., &c.*, 3 Exch. 841; 18 L. J. Ex. 345.

(*q*) *Cox v. Mid. C. Ry. Co.*, 3 Exch. 273; 18 L. J. Ex. 65.

(*r*) *Walker v. Great Western Ry. Co.*, L. R. 2 Ex. 228; 36 L. J. Ex. 123.

(*s*) *Burnes v. Pennel*, 2 H. L. C. 497; *Olding v. Smith*, 16 Jur. 500.

company was not responsible for the payment of such extra work, as it could not be inferred that they had ordered it. (*t*)

Informal Contracts where the Company has had the Benefit of the Performance of the Contract. — But wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect, and orders are given by persons having an apparent general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done or goods supplied and accepted by the corporation, the corporation cannot keep the goods or the benefit of the work and refuse to pay, on the ground that the formality of a deed was wanting. (*u*) And wherever a company has been incorporated for carrying on a particular business, and services have been rendered in the direct course of the business which by their charter they were to carry on, and the contract for those services has been recognized and adopted at a general meeting of the company, it is not competent to the company to repudiate their liability and refuse payment for the services rendered, on the ground that the contract was not made in conformity with the provisions of the act of incorporation. (*x*)

Contracts with Registered Joint-Stock Companies.¹ — The Companies Act, 1862 (25 & 26 Vict. c. 89), enables seven or more persons, by subscribing their names to a memorandum of association and complying with the requisitions of the act in respect of registration, to form themselves into an incorporated company, with unlimited liability, or with liability limited by shares or by guarantee (*y*), and prohibits more than ten persons

¹ Ewell says that (except in New York, where the subject is governed by peculiar statutes) unincorporated joint-stock companies throughout the United States are merely co-partnerships, so far as liability of members for contracts made in behalf of the body is concerned; they differ from partnerships chiefly in the methods and effect of transfers of a member's interest. *Love v. Payne*, 20 Am. L. Reg. 534, note; *Smith v. Virgin*, 33 Me. 148; *Flagg v. Swift*, 25 Hun, 623; *Abb. Dig. Corp.*, tit. *Associations*; *ib. tit. Joint-Stock Companies*.

(*t*) *Homersham v. Wolverhampton, & Co.*, 6 Exch. 137; *Lamprell v. Bil- & Bl. 349; 26 L. J. Q. B. 46; ante*, pp. * 89, * 90, * 91.
lericay Union, 3 Exch. 283.

(*u*) *Ante*, pp. * 89, * 90; *Pauling v. & Bl. 349; 26 L. J. Q. B. 46; ante*, pp. * 89, * 90, * 91.
London & N. West. Ry. Co., 8 Exch. 867.

(*x*) *Reuter v. Elect. Tel. Co.*, 6 Ell. c. 76.

(*y*) An unlimited company may register as a limited, and a limited company may re-register under 42 & 43 Vict.

from carrying on in partnership the business of banking, and more than twenty persons from carrying on any other business having gain for its object, (z) unless they are registered as a company under that act or under some previous act, (a) [* 95] or are authorized so to carry on business by * act of parliament, or letters patent, or are engaged in working mines within, and subject to the jurisdiction of, the stannaries. The leading purpose of this statute is to enable a permanent company, consisting of changing members, to make binding contracts, and sue and be sued, and do all the usual acts necessary for carrying on trade. The first part provides for the formation of the company through the medium of a memorandum and articles of association, the essential requisites of which relate almost exclusively to the rights and duties of directors and members *inter se*, regulating the name of the company, the objects for which the company is established, the limited or unlimited liability of the members, the amount of the capital, the number and amount of the shares, the transfer of shares, the registration of members, and the meetings and proceedings of the company. After registration of the memorandum of association, a certificate of the incorporation of the company is to be granted; and thereupon, by sect. 18, the company becomes incorporated, having perpetual succession and a common seal, with power to hold lands. The certificate of incorporation is conclusive evidence that all the requisitions of the act in respect of registration have been complied with. (b)

An assignment of future calls is bad: for calls should be made at the discretion of the directors, and an assignment of future calls prevents the exercise of such a discretion; but an assignment of a call already made, although not collected, is good. (c)

Requisites of Contracts with Registered Joint-Stock Companies.

— Before the passing of the 30 & 31 Vict. c. 131, companies could only contract without seal where the company was a

(z) *Moore v. Rawlins*, 6 C. B. N. s. 239; 28 L. J. C. P. 247. Farming and grazing are businesses having gain for their object. *Harris v. Amery*, L. R. 1 C. P. 148.

(a) *Wormersley v. Merrit*, L. R. 4 Eq. 695; 37 L. J. Ch. 19.

(b) *Oakes v. Turquand*, L. R. 2 H. L. 325; 36 L. J. Ch. 949; *Peel's case*, 36 L. J. Ch. 757; L. R. 2 Ch. 674.

(c) *Re Sankey Brook Coal Co.*, L. R. 9 Eq. 721; *Re Sankey Brook Coal Co.*, No. 2, L. R. 10 Eq. 381.

trading company, and the contract was for a purpose connected with the objects of the corporation. (*d*) But now contracts on behalf of a joint-stock company registered under the 25 & 26 Vict. c. 89, may be made (30 & 31 Vict. c. 131, sect. 37) as follows:— Any contract which, if made between private persons, would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing, under the common seal of the company, and may in the same manner be varied or discharged. If it is such a contract as is required by law to be in writing, and signed by the parties to be charged therewith, it may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and may in the same manner be varied or discharged.

* If it would by law be valid as between private persons, although made by parol, and not reduced into writing, it may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and may in the same manner be varied or discharged. All contracts so made are binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators.

The company may, by instrument in writing under their common seal, employ any person (sect. 55), either generally or in respect of any specified matters, as their attorney, to execute deeds on their behalf in any place not situated in the United Kingdom; and every deed signed by such attorney on behalf of the company, and under his seal, is binding on the company to the same extent as if it were under the common seal. The 27 Vict. c. 19, moreover enables joint-stock companies carrying on business in foreign countries to have official seals to be used in those countries.

Contracts by Agents.— Where a company, through their directors, hold out an officer of the company as their agent for a particular purpose, they cannot afterwards dispute acts done by him within the scope of such agency; (*e*) but where an advance has

(*d*) *South of Ireland Coll. Co. v. Waddle*, L. R. 3 C. P. 463; 4 C. P. 617; 38 L. J. C. P. 338. (*e*) *Wilson v. West Hartlepool Har- bor & Ry. Co.*, 34 Beav. 187; 2 De G. J. & S. 475.

been made on the personal responsibility of the agents of the company, a subsequent adoption of their acts by the directors will not make the company liable. (*f*)

Contracts in Violation of the Provisions of the Articles of Association.—Parties dealing with the directors of a joint-stock company are bound to take notice that they are dealing with parties having a limited authority; and they are bound by the limitation of authority contained in the registered articles of association, (*g*) unless the company at large, or the general body of the shareholders, have sanctioned acts and transactions by the directors in excess of the powers conferred upon them. If, on the other hand, the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, the person contracting with the directors is not bound to see that all those preliminaries have been observed, but is entitled to presume that the directors are acting lawfully in what they do. (*h*) Unless the memorandum and articles of association of a company contain in plain terms an express power enabling the company to purchase their own shares, such purchase is *ultra vires*, although the company may be empowered to deal in shares of joint-stock companies generally. (*i*) If a company has no power to do a particular thing, that power cannot be added to the company by the agreement of the shareholders; (*k*) but if a company has power to do a thing, and there be only requisite a particular formality, such as the consent of a general meeting, in order to warrant the exercise of the power, then acquiescence may be inferred from delay, and a knowledge of the transaction imputed to every shareholder; (*l*) and an agreement originally *ultra vires*

(*f*) *Scott v. Lord Ebury*, L. R. 2 C. P. 255; 36 L. J. C. P. 161.

(*g*) *Balfour v. Ernest*, 5 C. B. N. S. 624; *Shrewsbury (Earl) v. North Staffordshire Ry. Co.*, L. R. 1 Eq. 593; *In re Pooley Hall Co.*, 18 W. R. 201; see *English Channel Co. v. Rolt*, 17 Ch. D. 713.

(*h*) *Royal British Bank v. Turquand*, 6 E. & B. 327; *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869; see *Irving v. Union Bank of Australia*, 2 Ap. Cas. 366. Where by the articles

“the business is to be conducted by not less than” a specified number, the condition is imperative. *Bottomley's case*, 16 Ch. D. 681.

(*i*) *In re London, Hamburg, & Continental Exchange Bank*, *Zulueta's claim*, L. R. 5 Ch. 444.

(*k*) *Ashbury Carriage Co. v. Riche*, L. R. 7 H. L. 653.

(*l*) *British Provident Life & Fire Ins. Soc.*, *In re*, 32 L. J. Ch. 326; but see *Brotherhood's case*, 31 Beav. 365.

cannot be impeached after the lapse of considerable time. (*m*) Where the deed of settlement of a fire insurance company directed that in every policy issued by the directors the funds of the company should alone be made answerable for claims under such policy, and policies were issued by the authority of the directors not confining the liability to the funds of the company, and not complying with the provisions of the deed of settlement in other respects, it was held that the policies were not binding upon the company. (*n*) But it does not follow that a deed under the seal of the company *bona fide* entered into is absolutely void, if any formality which is prescribed by the articles of association has been omitted. To hold this to be the case would have the effect of vesting in these companies "an unlimited power of repudiation;" and this would be an unlimited power to defraud. (*o*) There may be a breach of duty on the part of the directors in neglecting to comply with certain formalities in respect of which they are responsible to the shareholders; but it does not follow that the contract is void as against the company. (*p*)

Where a harbor company was empowered by act of parliament to raise money by mortgage, and it was provided that the mortgages should be entered in the books of the company by their clerks, who were to indorse on such mortgages a memorandum of such entry, and it was also provided that, until the entries and indorsements were made, the mortgages should "not be valid or effectual," and money was borrowed by the company on mortgage, and the mortgage was entered in the company's books, but no memorandum of such entry was indorsed on the mortgage by the * clerk, pursuant to the requirements [*98] of the act of parliament: it was nevertheless held that the company could not set up their non-compliance with the act in order to defeat the claim of their mortgagee; for it was obvious that the legislature never intended to put it in the power of the

(*m*) Smallcombe's case, L. R. 3 Eq. 769; 3 H. L. 249; Holdsworth v. Evans, L. R. 3 H. L. 263; see, however, Spackman's case, L. R. 3 H. L. 171; Stanhope's case, L. R. 1 Ch. 161.

(*n*) Hambro' v. Hull & London Fire Ins. Co., 3 H. & N. 789; 28 L. J. Ex. 62.

(*o*) Ld. Campb., Prince of Wales Ins. Co. v. Harding, Ell. Bl. & Ell. 216; 27 L. J. Q. B. 307.

(*p*) Agar v. Athenæum Life Ass. So., 3 C. B. N. s. 756; *In re Bonelli's Telegraph Co.*, L. R. 12 Eq. 246; 40 L. J. Ch. 567.

company to defeat their own securities by their own default, and so commit a gross fraud. (*q*)

The power of giving a bill of sale as a security for debts is incident to a trading company, although it is not expressly conferred by the articles of association. (*r*)

So also is the power of raising money or giving security for a past debt by deposit of title deeds. (*s*)

Parties who have contracted with the directors of a registered joint-stock trading company, in matters relating to the co-partnership business, are not bound, when seeking to enforce their contracts against the company, to show that the directors were authorized by the articles of association to enter into them. *Prima facie* the directors have the necessary authority; and the burden of proving that the directors were restrained by the regulations of the company from making the particular contract sought to be enforced, and from binding the company thereby, lies upon the defendants. If managers, secretaries, or directors are appointed to carry on the business of a trading company, parties dealing with the company are not bound to inquire whether their agents or officers are properly appointed or not. If they exercise the duties of their office notoriously, and order goods which are received and used by the company in the ordinary course of its business, the company is responsible for payment thereof. (*t*) But if the contract sued upon has no relation to the business carried on by the company, and is not within the scope of any implied authority given for the purpose of managing and conducting the business thereof, the plaintiff is bound to prove affirmatively that the directors who profess to bind the company by the contract were duly authorized so to do. This may be done by showing that any particular course of dealing has been sanctioned by the directors and acquiesced in by the shareholders, or that the unusual contract has been sanctioned

(*q*) *Jortin v. S. E. R. Co.*, 6 De G. M. & G. 270; 24 L. J. Ch. 343; *Prince of Wales Ass. Co. v. Harding*, Ell. Bl. & Ell. 183.

(*r*) *Shears v. Jacobs*, L. R. 1 C. P. 513; 35 L. J. C. P. 241.

(*s*) *In re Patent File Co.*, L. R. 6

Ch. 83; see also *English Channel Co. v. Rolt*, 17 Ch. D. 715.

(*t*) *Smith v. Hull Glass Co.*, 8 C. B. 676; 19 L. J. C. P. 125; 11 C. B. 897; 21 L. J. C. P. 110; *Allard v. Bourne*, 15 C. B. 472; *Levy v. Metrop. Cab Co.*, 23 Law T. R. C. P. 67.

by a board meeting at which the requisite number of directors was present. (u) Persons employed by the directors of a company to supply goods, or to render any services * for [* 99] the purposes and requirements of the company, cannot be expected nicely to investigate the objects for which they are employed, and to resort in every case to the deed of settlement for the purpose of ascertaining whether those objects are or are not in accordance with its provisions and with the trusts reposed in the directors. (v) Where a company has power to enter into a contract for the purchase of goods, it is bound by such contract, although the goods may not be intended to be used for the purposes of the company, and although this fact may be known to the person with whom the contract is entered into. (x) But whenever a party dealing with a joint-stock company knowingly combines with the directors to do any act *ultra vires* to the prejudice of the shareholders, then the shareholders may very fairly deny their liability. (y)

Liability of Shareholders. — Every company limited under the act, whether limited by shares or by guarantee (sect. 41), must keep its name painted or affixed in a conspicuous position, and in letters easily legible, on the outside of its office or place of business, and must have its name in legible characters on its seal and on all its notices, advertisements, and official publications, and in all its bills, notes, indorsements, cheques, orders, bills of parcels, invoices, receipts, and letters of credit. All officers of the company, and persons acting on its behalf, disobeying the statute, are subjected (sect. 42) to various personal liabilities in respect of their contracts and proceedings in the matter. (z) If the company carries on business for a period of six months after the number of the members has been reduced to seven, every person who is a member during that period is liable (sect. 48) for the whole debts of the company then contracted.

Effect of the Winding-up Order. — *Bona fide* dispositions of property of a company in the ordinary course of its trade, made

(u) *Ridley v. Plym. Grind. &c.*, 2 Exch. 716; 17 L. J. Ex. 252. (y) *Prince of Wales Ins. Co. v. Harding*, Ell. Bl. & Ell. 217; 27 L. J. Q. B.

(v) *Green v. Nixon*, 3 Jur. N. s. 307. 994; 27 L. J. Ch. 819.

(z) *Penrose v. Martyn*, 28 L. J. Q. B. 28; Ell. Bl. & Ell. 499.

(x) *Re Contract Corporation*, L. R. 8 Eq. 14.

after the presenting of a petition for winding up, and completed before the winding-up order, will, in the exercise of the discretion given to the court by the Companies Act, sect. 153, be confirmed. (zz) Where, however, such dispositions are incomplete, and rest in contract at the time of the winding-up order, the court has no discretionary power to order the contract to be fulfilled; and the person with whom it was entered into, though he has paid his money, has only a general claim as a creditor for damages in respect of the breach of contract. (a)

[*100] * An agreement for a general lien on the goods of a company is determined by the winding-up order, at all events as to after-acquired property. (b)

Where a customer of a trading company had *bona fide* ordered and paid for goods, and the company had loaded the goods on a railway to his address, and sent him the invoices, after the presenting of the petition, but before the winding-up order, it was held that the disposition of the property was complete before the winding-up order, and the goods were ordered to be delivered to the customer. (c)

Contracts with official and other liquidators are regulated by the 25 & 26 Vict. c. 89. (d) A liquidator appointed under a resolution to wind up voluntarily is not personally responsible to the solicitor employed by him on the affairs of the liquidation for any of the costs of such liquidation. (e) Where a company is being voluntarily wound up, and there are four liquidators, one of them cannot, in the absence of any authority from the company, and solely upon the strength of a general resolution of his co-liquidators, accept bills on behalf of the company. (f)

Contracts with Railway Companies.¹ — Where a public act of

¹ For decisions on the powers of railroad companies or their boards of direction or managing agents to make contracts, see Abb. Dig. Corp., tit. Boards, Con-

(zz) See *Ince Hall Mills Co. v. Douglas Forge Co.*, 8 Q. B. D. 179.

(a) *Wiltshire Iron Co., In re, ex parte Pearson*, L. R. 3 Ch. 443.

(b) *Wiltshire Iron Co. Lim. v. Great Western Ry. Co.*, L. R. 6 Q. B. 101, 776.

(c) *Wiltshire Iron Co., In re*, L. R. 3 Ch. 443.

(d) See sects. 99 & 133.

(e) *In re Trueman's Estate, Hooke v. Piper*, L. R. 14 Eq. 278; 41 L. J. Ch. 585.

(f) *London & Mediterranean Bank, In re, ex parte Birmingham Banking Co.*, L. R. 3 Ch. 651; 36 L. J. Ch. 807; *Ex parte Agra & Masterman's Bank*, L. R. 6 Ch. 206; *Bolognesi's case*, L. R. 5 Ch. 567; 40 L. J. Ch. 26.

parliament limits and defines the authority of a railway company, and provides for the application of all the funds that come into the hands of the corporation or the directors, a contract for the accomplishment of objects not sanctioned by the act of parliament is illegal and void; (*g*) and the assent of all the shareholders to such a contract, though it may make them all personally liable to perform the contract, will not bind them in their corporate capacity, or render liable the corporate funds. (*h*) Incorporated railway companies have no existence independently of the acts which create them; and they are created by parliament with special and limited powers and for limited purposes. When, therefore, they exceed, or attempt to exceed, their powers, they are acting in contravention of the law which established them, and in opposition to what courts of justice are bound to consider to have been the intention of parliament in their creation. (*i*)

* A railway company incorporated by a special act of [* 101] parliament, containing the usual clauses inserted in such statutes, cannot draw, accept, or indorse bills of exchange. (*k*)

Contracts by the Promoters of a Railway made before Incorporation, for the purpose of procuring the act of incorporation and establishing the undertaking, cannot be enforced against the company (*l*) if they are *ultra vires* of the company; (*m*) but if not *ultra vires*, they may be enforced, if they have been adopted and acted upon by the company after it has obtained its act of incorporation, (*n*) or if the engagement is embodied in the act itself.

tracts, Railroad Companies; Jones, R. R. Securities; Lacey, Dig. Ry. Dec.; Pierce, R. R., ch. 19, *The Powers of the Corporation*; ib. ch. 2, *The Direction*, &c.; 1 Redf. Rys., ch. 21, *Railway Directors*; ib. ch. 22, *Arrangements between Companies*; U. S. Dig., tit. *Railroad Companies*, sect. 276-279; ib. tit. *Corporations*, V. 3.

(*g*) Taylor v. Chichester & Midhurst Ry. Co., L. R. 2 Ex. 356; 36 L. J. Ex. 201; Atty.-Gen. v. Great Northern Ry. Co., 1 Drew. & Sm. 154; Atty.-Gen. v. Great Eastern Ry., 5 Ap. Cas. 473.

(*h*) Colman v. Eastern Counties Ry. Co., 10 Beav. 1.

(*i*) Shrews. & Birm. Ry. Co. v. Lond. & N. W. Ry. Co., 22 L. J. Ch. 683; East. Angl. Ry. Co. v. East. Co., 11 C. B. 775; 21 L. J. C. P. 23; Norw. v. Norf. Ry. Co., 1 Jur. N. s. 348.

(*k*) Bateman v. Mid-Wales Ry. Co., L. R. 1 C. P. 499; 35 L. J. C. P. 205.

(*l*) Caledon. & Dumb. Ry. Co. v. Helenburgh Mag., 2 Macq. 409.

(*m*) Shrewsbury (Earl) v. North Staff. Ry. Co., L. R. 1 Eq. 593.

(*n*) Williams v. St. George's Harbor Co., 27 L. J. Ch. 691.

The Power of Directors and Committees of Directors to make Contracts on behalf of the company may be lawfully exercised as follows: with respect to any contract which, if made between private persons, would be by law required to be in writing and under seal, the committee or the directors may make such contract on behalf of the company in writing and under the common seal of the company, and in the same manner may vary and discharge the same; with respect to any contract which, if made by private persons, would be by law required to be in writing and signed by the parties to be charged therewith, the committee or the directors may make such contract on behalf of the company, in writing, signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary and discharge the same; and with respect to any contract which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, the committee or the directors may make such contract on behalf of the company, by parol only, without writing, and in the same manner may vary and discharge the same. (*o*) Directors exercising the powers given by these enactments must act together and as a board; (*p*) but the enactments are affirmative only, and do not preclude the enforcement against a company of the ordinary equity based on part performance. (*q*)

Informal Contracts for Services by Railway Companies. — By sect. 91 of the Companies Clauses Consolidation Act, 1845, “the determination as to the remuneration of the auditors, treasurer, and secretary shall be exercised only at a general meeting of the company.” If, however, the company does not think fit [**102*] to make its determination * known at a general meeting, and the directors contract with a secretary to give him a certain salary, and the secretary serves the company under the contract, it is no answer to an action against the company for the stipulated remuneration to say that the remuneration he is to receive has never been determined by a general meeting of the company. (*r*)

(*o*) 8 & 9 Vict. c. 16, sect. 97.

(*p*) *D'Arcy v. The Tamar, &c., Ry. Co.*, L. R. 2 Ex. 158.

(*q*) *Wilson v. West Hartlepool Ry. & Harbor Co.*, 34 L. J. Ch. 241.

(*r*) *Bill v. Darent Ry. Co.*, 1 H. & N. 305; 26 L. J. Ex. 81.

Of Contracts with Co-Partnerships and Associations authorized to sue and be sued in the Name of their Secretary, Treasurer, or Public Officer.¹—In order to obviate inconveniences ensuing from changes in the members, and technical objections arising from the non-joinder as plaintiffs in an action upon a contract of all who were partners at the time the contract was entered into, acts of parliament have from time to time been procured, empowering certain banking, trading, insurance, and other companies and co-partnerships to sue and be sued in the name of their managing officer, or their treasurer or secretary for the time being, and providing that the actions so brought shall not abate or be discontinued by the death or removal of such nominal plaintiff whilst the action is pending. The right of action of the public officer is not affected by a change in the name of the firm, or the accession of new partners or shareholders; (s) and it is in general absolutely vested in him, so that the action upon all contracts entered into with the directors and trustees *must* be brought in his name, and not in the names of those who are the actual parties to the contract. (t) Therefore, where a covenant was entered into with several of the co-partners of such a co-partnership *nominatim*, it was held that the action upon the covenant must nevertheless be brought by the public officer, and that the covenantees could not sue in their own names upon the covenant, the words “shall and may” in the acts creating these

¹ New York Laws 1849, 389, ch. 258, authorized joint-stock companies of not less than seven persons to sue and be sued in name of president or treasurer; and this provision was, by Laws 1851, 838, ch. 455, extended to companies having joint or common interest or liability in any right of action, while 1 Laws 1867, 576, ch. 289, defined the powers of such associations to purchase, hold, and convey property. Decisions on the corporate character and the powers of contracting possessed by companies under these acts are: *Crater v. Binniger*, 45 N. Y. 595; *aff'd* 54 Barb. 155; *Wright v. Delafield*, 23 Barb. 498; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. 157, 3 Abb. Pr. 163; *Churchill v. Stone*, 58 Barb. 233; *Bray v. Farwell*, 3 Lans. 495; *Sandford v. Supervisors of N. Y.*, 15 How. Pr. 172; *Ebbinghousen v. Worth Club*, 4 Abb. N. Cas. 300; *Boston, &c. R. R. v. Pearson*, 128 Mass. 445; *Dinsmore v. Philadelphia, &c. R. R. Co.*, 11 Phila. 483. As to similar associations in other States, see *Stafford Nat. Bank v. Palmer*, 47 Conn. 443; *Richmond Factory Assoc. v. Clarke*, 61 Me. 351; *Attorney-General v. Mercantile, &c. Ins. Co.*, 121 Mass. 524; *Detroit Schützen-Bund v. Detroit Agitations-Verein*, 44 Mich. 313; *Ferris v. Thaw*, 72 Mo. 446.

(s) *Wilson v. Craven*, 8 M. & W. 584.

(t) *Steward v. Greaves*, 10 M. & W. 719.

co-partnerships and vesting the right of action in the public officer being obligatory and not merely permissive. (*u*) But the power of entering into contracts on behalf of the company is not transferred to such treasurer, secretary, or public officer, but continues to reside with the directors in whose hands the management of the co-partnership is placed. The extent of the right of action of the public officer generally depends upon the construction of acts of parliament, the words of which are sometimes very large, vesting in him the right to sue upon all contracts in which the company is "concerned or *interested*," or [*103] which have *been entered into "with any person in trust for the company," or "with any person for the use or benefit of the company." (*x*)

Liability of the Public Officer. — The secretary, clerk, or public officer of a company authorized by act of parliament to be sued in the name of a clerk, secretary, public officer, or other nominal defendant, is not in general personally responsible upon a judgment obtained against him, (*y*) unless he is a member of the company, and responsible as such upon the judgment. (*z*)

Contracts with the Managers and Shareholders of Mining Companies.¹ — Shareholders in mining companies carried on on the

¹ The laws governing mining companies vary somewhat in the different States. The doctrine generally recognized is that they have implied or incidental power to contract and to bind themselves to persons dealing with them in matters within the scope of the business and the intent of the charter, even though the act of incorporation does not expressly confer power to incur debts. *Wood Hydraulic, &c. Min. Co. v. King*, 45 Ga. 34; *Moss v. Averell*, 10 N. Y. 449; *Reading, &c. Manuf. Co. v. Gracff*, 64 Pa. St. 395. For the extent and limits of this corporate power, see *Mahoney Min. Co. v. Anglo-Californian Bank*, 21 Am. L. Reg. N. S. 100; *Miami Coal Co. v. Wigton*, 19 Ohio St. 560; *Roberts's Appeal*, 60 Pa. St. 400; *Davis v. Flagstaff Silver Min. Co.*, 2 Utah, 74; *Consolidated Gregory Co. v. Raber*, 1 Col. T. 511; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, ib. 531; see further *Lonkey v. Succor Mill, &c. Co.*, 10 Nev. 17; *Lee v. Pittsburgh Coal, &c. Co.*, 56 How. Pr. 373; *Blanch. & W. Lead. Cas. on Mines*, ch. 16.

Where the managing officers have been cognizant of a contract made in the name of the company by an employee, and have allowed it to be acted on without

(*u*) *Chapman v. Milvain*, 5 Exch. 61; 19 L. J. Ex. 228; *Wills v. Sutherland*, 4 ib. 211. As to the death or removal of the officer during the pendency of an action, see *Barnewall v. Sutherland*, 9 C. B. 380.

(*x*) *Skinner v. Lambert*, 5 Sc. N. R. 197; *Smith v. Goldsworthy*, 4 Q. B. 461.

(*y*) *Wormwell v. Hailstone*, 4 M. & P. 512; *Harrison v. Timmins*, 4 M. & W. 510.

(*z*) *Harwood v. Law*, 7 M. & W. 203.

cost-book principle are co-adventurers together, but they are not clothed with the ordinary liabilities of co-partners. One shareholder, for example, has no power of binding another by contract, unless he has been appointed a manager of the mine. The shareholders, moreover, are not liable upon bills or notes drawn, accepted, or made by the purser or managers or directors of the company, or for money borrowed by them or their resident agent or manager for the purpose of paying the wages of servants or workmen, or for the general purposes of the association. (a) And there is not, it seems, as between the managers and directors of the company, any implied authority from one manager to another to draw or accept bills or make promissory notes for the purposes of the company, so as to bind the other managers without their knowledge and express concurrence. (b) But a manager who accepts bills of exchange for the company will himself be responsible upon the acceptance, if he has accepted without any authority from the company on whose behalf he professed to act. (c) Those persons, also, who take an active part in the management of the mine, who personally give orders for the supply of machinery, or who are present at meetings when machinery is ordered, or who receive a share of the profits of the mine, or who agree to furnish capital and receive profits, if profits are realized, are responsible for the payment of the price

objecting, this may render it obligatory on the corporation. *Lee v. Pittsburgh Coal, &c. Co.*, 56 How. Pr. 373.

Independent of special restrictions, the powers of the general agent or superintendent placed in actual charge of the mine will be presumed to extend to all the ordinary local business of the enterprise (*Adams Min. Co. v. Senter*, 26 Mich. 73), and his authority to make any particular contract for the company need not be shown by corporate seal or formal vote (*Crowley v. Genesee Min. Co.*, 55 Cal. 273); but he has not implied power to borrow money on the credit of the company, or bind it by a promissory note (*Carpenter v. Biggs*, 46 Cal. 91; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Col. T. 565); neither has a "secretary" such power (*Blood v. Marcuse*, 38 Cal. 590). A "general superintendent" is not a laborer, servant, operative, &c. within a statute giving laborers and servants recourse against shareholders for unpaid wages. *Hill v. Spencer*, 61 N. Y. 274; *Dean v. De Wolf*, 16 Hun, 186; *Krauser v. Ruchel*, 17 Hun, 463.

(a) *Hybart v. Parker*, 4 C. B. N. s. M. & W. 252; *Dickenson v. Valpy*, 10 B. & C. 128; *Burmester v. Norris*, 6

(b) *Ricketts v. Bennett*, 17 L. J. C. Exch. 796; 21 L. J. Ex. 43.
 P. 19; 4 C. B. 686; *Hawtayne v. Bourne*, (c) *Owen v. Van Uster*, 10 C. B. 318;
 7 M. & W. 595; *Brown v. Byers*, 16 20 L. J. C. P. 61.

of things ordered and consumed in the ordinary business of the company. (*d*)

Who is a Shareholder. — A written acceptance of shares in a mining company signed by the defendant is evidence [*104] against him * of his being a shareholder. (*e*) If his name is entered in the books of the company amongst the names of the shareholders with his knowledge and concurrence, or if he has admitted that he is a shareholder, there is proof against him of his being a shareholder, although it cannot be shown that he has actually received profits or obtained any dividend upon his shares. (*f*) If, however, no share in the mine or right to share in the profits thereof has been actually transferred to him, and he is not in reality a holder of shares, and has no legal interest in the concern, and has not acted as an ostensible partner, he will not be responsible as a partner; and no acknowledgment made under a mistaken supposition of his own that he is a shareholder when he is not a shareholder will make him liable, unless it were communicated to the plaintiff so as to mislead him. (*g*) Although the property in mining shares may pass by delivery of the certificates of proprietorship, yet the holder of the certificates does not in general become a shareholder until his name is entered in the share-register book; and the vendor of mining shares is not in general discharged from liability as a shareholder until his name has been expunged from the book. (*h*)

Insurance Companies are frequently constituted, and the policies issued by them framed, upon the terms that a certain specified subscribed capital, and the stocks, funds, securities, and property of the company shall alone be liable to make good claims arising upon their policies; that the directors signing the policies shall not be responsible to any greater extent than the funds or property in their hands or power shall be competent to discharge; and that no proprietor shall, in any event whatever,

(*d*) *Ellis v. Schmoeck*, 3 M. & P. 220; 5 Bing. 521; *Steigenberger v. Carr*, 3 Sc. N. R. 466; *Tredwen v. Bourne*, 6 M. & W. 465; *Hawken v. Bourne*, 8 M. & W. 710; *Peel v. Thomas*, 15 C. B. 714; 24 L. J. C. P. 86.

(*e*) *Toll v. Lee*, 4 Exch. 230; 18 L. J. Ex. 364.

(*f*) *Ralph v. Harvey*, 1 Q. B. 845.

(*g*) *Vice v. Lady Anson*, 7 B. & C. 411.

(*h*) *Humby, ex parte*, 28 L. J. Ch. 875.

be liable beyond the amount of the unpaid part of his share in the subscribed capital stock of the company. When this limitation of liability is made an express term of the contracts entered into between the company and third parties, these last are of course bound thereby; and when the capital stock has been subscribed and expended, the directors and shareholders are relieved from liability upon the contract. (*i*) So long, however, as the shareholders have not paid up the whole of their shares, and the capital stock is not all expended, the directors who seal or sign the policy are liable thereon, and they must provide funds by making calls on the shareholders. (*k*) Where certain directors of an insurance * company, by policy under seal, [* 105] ordered, directed, and appointed that the capital stock and funds of the company should stand charged with and be liable to pay £500 to the plaintiff, it was held that this was a personal covenant on the part of the directors to pay if the funds proved adequate, and that they were individually liable thereon, unless they could show that the company was insolvent. (*l*) In a contract of this kind the whole body are not made joint contractors, but each individual of the company is bound to make good the loss in the same proportion as his share bears to the total capital, in the nature of a separate underwriter; and the individual proprietors are not responsible for any others than themselves. (*m*) If the limitation of liability is not made part of the contract with the company, and the parties dealing with the company have no notice of it, they will of course not be bound by it. (*n*) A policy under the seal of the company cannot be avoided merely by showing that some of the formalities required by the deed of settlement, in order to render the contract binding on the company, have not been complied with. (*o*) But an ordinary local agent of an insurance company is not, without special authority,

(*i*) *Halket v. Mercht. Trad., &c.*, 13 Q. B. 960; *Hassell v. ib.*, 4 Exch. 529; *Hickman v. Cambrian, &c. Ins. Co.*, 28 L. J. Ex. 379; *Prince of Wales, &c. Ass. Co. and Athenæum Soc., in re, ib.* Ch. 335.

(*k*) *Andrews v. Ellison*, 6 Moore, 206.

(*l*) *Gurney v. Rawlins*, 2 M. & W. 90; *Dawson v. Wrench*, 3 Exch. 359.

(*m*) *Hallett v. Dowdall*, 18 Q. B. 2; 21 L. J. Q. B. 98; *Reid v. Allan*, 4 Exch. 326.

(*n*) *Gordon v. Sea, &c. Ins. Soc.*, 1 H. & N. 599; 26 L. J. Ex. 202; *State Fire Ins. Co.*, 32 L. J. Ch. 300.

(*o*) *Prince of Wales Ass. Co. v. Harding, Ell. Bl. & Ell.* 217; 27 L. J. Q. B. 307.

authorized to bind the company by a contract to grant a policy. (*p*)

Of Contracts with Banking Co-Partnerships.¹—The mere shareholders of a co-partnership under the management of

¹ The powers of national banks (or their boards of directors or managing agents) to make corporate contracts are conferred by acts of Congress embodied in Rev. Stat. tit. 67. Since the revision, the legislation relative to the banks seems not to have affected their corporate power of contracting in any important particular, except that an act approved July 12, 1882, enables them to extend their corporate existence, and increases the penalty for falsely certifying cheques. The chief provisions of the law and the decisions under them are exhibited in Abb. Dig. Corp. Supp. (1878), tit. *Banks*, sects. 10-56; 117-130; 133-141; 147, 148. The cases are conveniently collected in Thomp. Nat. Bank Cas., and Supp. by Browne. See also an article by G. P. Blair, "Limitations on the Powers of National Banks," 6 South. L. Rev. 500.

Recent decisions are : Circulating notes do not require Treasury seals. *United States v. Bennett*, 17 Blatchf. 357.

Limits of power to deal in promissory notes. *National Pemberton Bank v. Porter*, 125 Mass. 333; *Attleborough Nat. Bank v. Rogers*, ib. 339; *First Nat. Bank v. Pierson*, 24 Minn. 140; *Lazarus v. Union Nat. Bank*, 52 Md. 78.

Right to sue on a note purchased or a loan made without authority. *Atlas Nat. Bank v. Savery*, 127 Mass. 75; *Penn v. Bornman*, 26 Alb. L. J. 232.

Power to buy and sue on coupons of railroad bonds. *First Nat. Bank v. Bennington*, 16 Blatchf. 53.

Power to manage an exchange of coupon bonds for registered, as agent of bondholder. *Yerkes v. National Bank*, 69 N. Y. 332.

Power to receive money to be invested in municipal bonds for its owner. *First Nat. Bank v. Hoch*, 89 Pa. St. 324.

Power to accept a special deposit, and extent of liability for safe keeping thereof, and for conversion or negligent loss by officers. *National Bank v. Graham*, 100 U. S. 699; *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 17 Hun, 419; *Gould v. Cayuga County Nat. Bank*, 56 How. Pr. 505; *First Nat. Bank v. Rex*, 89 Pa. St. 308.

Liability for cashier's hypothecating for his own debt stocks intrusted to the bank for sale. *Williamson v. Mason*, 19 N. Y. Supm. Ct. 97.

Power to guarantee a note. *People's Bank v. National Bank*, 101 U. S. 181.

Power to lend the corporate credit, or give a guaranty or an accommodation note. *Seligman v. Charlottesville Nat. Bank*, 3 Hughes, 647; *Johnstown v. Charlottesville Nat. Bank*, ib. 657.

Power to bid for lands at a foreclosure sale. *Heath v. Second Nat. Bank*, 70 Ind. 106.

Power to take lands in satisfaction of debt, and when it may be exercised by president. *Libby v. Union Nat. Bank*, 99 Ill. 622.

Power to sell immovable property. *New Orleans Nat. Bank v. Raymond*, 29 La. Ann. 355.

Power to take stocks as collateral security. *National Bank v. Case*, 99 U. S. 628; *Baldwin v. Canfield*, 26 Minn. 43.

trustees or directors have no authority to contract for one another, or to pledge the credit of the co-partnership; (g) but the directors appointed to carry on the business have impliedly all such of the ordinary powers of partners in a common mercantile partnership as are necessary for carrying on the business for which the company is formed; and where a banking co-partnership is established, the directors are considered the agents of the shareholders to borrow money for the ordinary purposes of the business, and to give securities in the ordinary form for the money borrowed, unless the power is excluded by the express provisions of the deed of settlement. They have authority, therefore, to give promissory notes or to accept bills of exchange, so as to bind themselves and the other shareholders; and if there is any objection in point of form to the validity of the bills or notes, the money obtained upon them by the directors may be recovered as money lent to the company. If there is any irregularity in the * transaction, and the [*106] shareholders lie by and acquiesce in the irregularity, they will be deemed to have subsequently ratified the acts of the directors. (r) If the manager of the bank is intrusted with a general power of accepting, making, and indorsing bills and notes, an innocent indorsee will not be prejudiced by any irreg-

Power to take a mortgage on accepting renewal of a note. *Howard Nat. Bank v. Loomis*, 51 Vt. 349.

Power to take an assignment of notes secured by mortgage on trust deed of real property as collateral security for a pre-existing debt. *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Mapes v. Scott*, 88 Ill. 352.

Mortgage taken as security for a discount or conveyance of land, voidable on objection of government, but not void. *Graham v. Nat. Bank*, 32 N. J. Eq. 804; *Warner v. De Witt County Nat. Bank*, 4 Ill. App. 305; *National Bank v. Matthews*, 98 U. S. 621; *Thornton v. Exchange Bank*, 71 Mo. 221; *Fridley v. Bowen*, 87 Ill. 151.

Validity of mortgage of lands taken as security for existing and anticipated indebtedness. *National Bank v. Whitney*, 103 U. S. 99.

Penalty or forfeiture for taking usury. *Ordway v. Central Nat. Bank*, 47 Md. 217; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *Cheek v. Merchants' Nat. Bank*, 10 Heisk. 618, note; *Barnet v. National Bank*, 98 U. S. 555; *Johnson v. National Bank*, 74 N. Y. 329; *Gloversville Nat. Bank v. Wells*, 15 Hun, 51; *Cake v. First Nat. Bank*, 86 Pa. St. 303; *Bank of Cadiz v. Slemmons*, 34 Ohio St. 142; *First Nat. Bank v. Childs*, 130 Mass. 519.

(g) *Burnes v. Pennell*, 2 H. L. C. Bl. 1; 23 L. J. Q. B. 229; *Bank of Australasia v. Bank of Australia*, 12 Jur. 521.

(r) *MacLae v. Sutherland*, 3 Ell. & 195.

ularity in his mode of exercising it ; but if he has only a special and limited authority, and the indorsement conveys an express intimation to that effect, the indorsee must at his peril make inquiry as to whether or not the authority has been properly exercised before he advances his money upon, or gives credit to, the indorsement. (*s*)

Banking Co-Partnerships established under the 7 Geo. 4, c. 46, are authorized (sect. 9) to sue and be sued in the name of one of the public officers as the nominal plaintiff or defendant ; and every judgment and decree obtained against the public officer is to operate (sect. 12) as a judgment against the co-partnership, and execution may be issued thereon (sect. 13) against any co-partner for the time being. And if the judgment is not satisfied, it may then be issued against any person who was a member of the co-partnership at the time when the contract on which such judgment was obtained was entered into, or became a member at any time before such contract was executed, or was a member at the time such judgment was obtained, provided leave is granted by the court in which the judgment was obtained, after notice to the person sought to be charged, and before the expiration of three years from the time such person shall have ceased to be a member of the co-partnership. (*t*)

Liabilities of Provisional Directors and Committeemen.¹ — All persons who take an active part in working out a project, who attend meetings at which resolutions are made or orders given for the employment of agents or servants, or the supply of goods in furtherance of a joint undertaking, render themselves in general jointly responsible for the remuneration and payment of the services rendered or goods supplied in obedience to the orders so given. (*u*) Every person, also, who holds himself out,

¹ See articles by H. O. Taylor on "Rights and Liabilities arising through the Promotion, &c. of a Corporation," 16 Am. L. Rev. 281; *ib.* 357; and by R. Cox on "Promoters as Corporate Fiduciaries," *ib.* 671; also 68 Ind. 344.

(*s*) *Alexander v. Mackenzie*, 6 C. B. 766; *Eyre v. MacDowell*, 14 Ir. C. L. R. 332; *Stagg v. Elliott*, 12 C. B. n. s. 373; 31 L. J. C. P. 260.

(*t*) *Parke, B., Dodgson v. Scott*, 17 L. J. Ex. 326. See the 7 & 8 Vict. c. 32, sect. 26, as to banking co-partner-

ships carrying on business within sixty-five miles of London. See also the 27 & 28 Vict. c. 32, as to banks which have discontinued the issue of their own bank notes.

(*u*) *Braithwaite v. Skofield*, 9 B. & C. 402; *Lake v. Duke of Argyll*, 6 Q. B.

or permits himself to be published to the world, as one of the acting committeemen or managers of a projected company, may become * chargeable to parties who, subsequently to such announcement, have dealt with the managing committee; and all the actual and publicly reputed managers may become responsible upon orders given or contracts entered into by the managing committee, at meetings at which they have not been present, but not for things done pursuant to orders given before they became acting members or managers. (x) Where the plaintiff and the defendants were desirous of starting a company to take the plaintiff's premises and stock-in-trade, and the plaintiff sent a written proposal to the defendants for the sale of his extra stock, and they sent the plaintiff a written acceptance thereof, and the proposal was directed to and accepted by the defendants "on behalf of the proposed G. R. A. H. Co. (Limited)," it was held that, as the company was non-existent at the time of the agreement, the defendants were personally liable, and that parol evidence was inadmissible to show a contrary intention. (y)

One member of a managing committee has, in general, no authority to bind another member. If the business of the company has always been transacted through the medium of resolutions passed by a managing committee and through orders given by the secretary or some accredited officer of the committee, one committeeman would not be responsible for the private and individual orders and contracts of a co-committeeman, or of any of the projectors, or of the secretary, made without the knowledge and sanction of the board, and of which he has known nothing until a claim is made upon him in respect thereof. The act of a secretary not authorized by the board does not bind the board; and if authorized by it, it binds only those members who were present and concurred in giving authority to the secretary. (z) Where a railway company was projected and a com-

477; *Glenester v. Hunter*, 5 C. & P. 65; *P. 409, n.*; *Doubleday v. Muskett*, 4 M. Kerridge *v. Hesse*, 9 C. & P. 200; *Burls v. Smith*, 5 M. & P. 735. & P. 760.

(y) *Kelner v. Baxter*, L. R. 2 C. P. 174; 36 L. J. C. P. 94.

(z) *Burnside v. Dayrell*, 3 Exch. 231; *Horsley v. Bell*, Amb. 770; 1 Br. C. C. 101, n.; *Maudslay v. Le Blanc*, 2 C. & Rennie *v. Wynn*, 4 ib. 697.

mittee of management formed, and the defendant consented to become a member of such committee, and afterwards took the chair at one of its meetings, it was held that he was responsible for the payment of a stationer's bill for pens, ink, and paper supplied by the order of the secretary for the use of the committee, after the defendant had become a member of it. (a) A committeeman is not responsible for things ordered by the solicitor of the company, unless it be proved that the solicitor acted under an express authority from the committee. (b) If [*108] an authority to contract on behalf of the company * or a committee is vested in eight persons, those who delegated to them the particular authority are not bound by the acts and contracts of six out of the eight. (c) The mere attendance of a party at a meeting called to consider the advisability of a scheme, and not to carry it into effect, and at which meeting no orders are given for expenses to be incurred, or for anything to be done for the purpose of working out the project, will not render the party responsible upon orders given at subsequent meetings which he has not attended. And if parties employed by the managing committee or directors are expressly told that they must look to the deposits for remuneration for their services, and that the members of the committee will not hold themselves personally responsible for payment, these last will then be protected from personal liability. (d) But if an advance is made on the personal responsibility of the promoters, the subsequent adoption of their acts by the directors after the company has been formed will not relieve them from liability. (e) A member of a managing committee cannot, of course, be made responsible for the price of goods ordered, or work done, or upon contracts entered into by the committee before he became a member, or held himself out to the world as a member of it, (f) nor after he has retired from the management. (g) Where the

(a) *Barnett v. Lambert*, 15 M. & W. 489.

(b) *Cooke v. Tonkin*, 16 L. J. Q. B. 153.

(c) *Brown v. Andrew*, 18 L. J. Q. B. 153.

(d) *Giles v. Smith*, 11 Jur. C. P. 334;

Rennie v. Clark, 5 Exch. 293; *Landman v. Entwistle*, 7 ib. 632.

(e) *Scott v. Lord Ebury*, L. R. 2 C. P. 255; 86 L. J. C. P. 161.

(f) *Beale v. Moulds*, 16 L. J. Q. B. 410; *Newton v. Belcher*, 12 Q. B. 921.

(g) *Maitland, Ex parte*, 23 L. J. Ch. 148.

defendant and others, as provisional directors of a projected company, resolved at a meeting that the company should be advertised in several newspapers, and directed their secretary to take the necessary steps for that purpose, and the secretary accordingly applied to an advertising agent, to whom (on his calling at the company's offices to inquire under what authority the secretary was acting) he showed the prospectus and the above resolutions, it was held that there was evidence that the directors who were parties to the resolutions were responsible for the debt thereby incurred, notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all the preliminary expenses would be provided for by him and that they would incur no liability, there being nothing to show that the secretary, in giving the orders or in communicating to the plaintiff the resolutions of the directors, had acted beyond the scope of his actual or apparent authority as secretary. (*h*) But where A consented to his name being inserted in a prospectus as a director of a projected company, and on the *prospectus [*109] being sent to him by the secretary of the company suggested alterations, and also that the company should be advertised in a particular newspaper, it was held that there was no evidence that he authorized the secretary to pledge his credit for all the expenses of advertising the company. (*i*)

Powers and Responsibilities of Provisional Committeemen. —

An association of persons who have agreed to act together as provisional committeemen is not a co-partnership; and one committeeman is not impliedly the agent of another for the purpose of carrying the common object into effect. The mere fact, therefore, of a person's having agreed to become a member of a provisional committee of a projected undertaking will not render him responsible upon the contracts and for the debts and engagements of such committee; and the mere announcement of the fact in printed papers and prospectuses, issued by his authority, will not make him liable. "If not responsible as

(*h*) *Maddick v. Marshall*, 16 C. B. C. P. 536; *Collingwood v. Berkeley*, 15 N. s. 387; 17 C. B. N. s. 829; *Riley v. C. B. N. s. 145.*

Pakington, 36 L. J. C. P. 204; L. R. 2 (i) *Burbridge v. Morris*, 3 H. & C. 664; 34 L. J. Ex. 131.

being one of the committee in fact, he cannot become so by the representation of that fact." (*k*) A provisional committeeman who has not himself received the deposit paid on an allotment of shares, and who has taken no part in the management of the undertaking, is not responsible for the application of the deposits by the managers. (*l*) But if the general management of the business of the company is vested in a provisional committee of management, every member of such committee who takes an active part in the management will be responsible upon the contracts entered into by such committee. (*m*) If there is both a provisional committee and a managing committee co-existing, the members of the latter are not in general the agents of the former, and their contracts do not bind the members of the provisional committee in the absence of express proof of agency. (*n*) But if a company starts with a provisional committee of management consisting of a great number of persons, all of them taking a more or less active part in the management, and then another smaller managing committee is formed, so that there is both a provisional committee and a managing committee co-existing, and the provisional committee has the appointment of, and the control over, the managing committee, the members of the latter may become the agents of the former, authorized to act for them as well as on their own account. (*o*)

Contracts with Committees of Clubs and Eleemosynary

[*110] * **Institutions.**¹—The members of the managing committee of a club or charity are personally responsible

¹ A social club, though without formal constitution and by-laws, and without purposes of profit or pecuniary advantage, may be held liable (under New York statutes) as a joint-stock association, or association of seven or more persons having a common interest. *Ebbinghausen v. Worth Club*, 4 Abb. N. Cas. 300.

All the members of a club or association formed for social and recreative purposes, having a name under which liabilities are incurred, are jointly liable for debts thus incurred; and each one continues liable so long as he remains a member, and even after, until he notifies the creditors of the association of his withdrawal therefrom. *Park v. Spaulding*, 17 N. Y. Supp. Ct. 128.

(*k*) *Reynell v. Lewis*, *Wyld v. Hopkins*, 15 M. & W. 517; 16 L. J. Ex. 30; *Barker v. Stead*, 3 C. B. 946; *Patrick v. Reynolds*, 1 C. B. N. s. 727.

(*l*) *Burnside v. Dayrell*, 3 Exch. 227; 19 L. J. Ex. 46.

(*m*) *Bailey v. Macaulay*, 13 Q. B. 815; 19 L. J. Q. B. 78.

(*n*) *Williams v. Pigott*, 2 Exch. 201; *Dawson v. Morrison*, 16 L. J. C. P. 240.

(*o*) *Tanner, Ex parte*, 21 L. J. Ch. 214.

for the payment of tradesmen who have supplied goods, and to servants who have performed work and rendered services, for the benefit of the club or for the advancement of the common objects of the institution, by order of the committee, as the credit is deemed to have been given to the committee rather than to the subscribers at large, who are a constantly fluctuating body, unknown individually to the persons executing such orders. (*p*) Subscribers who pay an entrance fee on admission to a club, and an annual subscription afterwards, for the purpose of forming a fund for defraying the expenses of the establishment, and who appoint a committee to administer such fund, are not themselves responsible upon the contracts and engagements, or for the debts and liabilities, of such committee, (*q*) unless it can be shown that they individually concurred in, or assented to, the orders given, or authorized the committee to pledge their credit. As the members of the committee, therefore, in these cases do not bind the subscribers at large by their contracts, or give to the persons whom they have employed a tangible third party to proceed against, they are themselves the only persons who can be sued, and are in fact principals in the transaction. (*r*) If the managing committee of a club or eleemosynary or literary institution, or any other association of persons, allow the steward or secretary, or any one of the members of the committee, to discharge the functions of the whole body, as, for instance, to order supplies of goods on credit or to hire workmen and servants for the use of the institution, they make him their general agent, and clothe him with an implied authority to pledge their credit for the payment of the things ordered and of the people employed by him, within the limits of the ordinary course of dealing, unless they have beforehand furnished him with sufficient

Unincorporated stock exchanges, boards of brokers, boards of trade, are neither joint-stock companies nor partnerships as between the members, though third persons may acquire a right to hold a member liable for contracts of the society. See 21 Am. Law Reg. 413, note.

Whether distribution of liquors among members of social clubs is "selling," see *Minor v. State*, 63 Ga. 318; *Rickart v. People*, 79 Ill. 85; *Slim v. State*, 55 Md. 566.

(*p*) *Cullen v. Duke of Queensbury*, 1 Br. P. C. 404; 1 Br. C. C. 101. (*r*) *Burls v. Smith*, 7 Bing. 705; 5 M. & P. 735; *Glenester v. Hunter*, 5

(*q*) *Flemyng v. Hector*, 2 M. & W. C. & P. 65.

funds for the purpose, and never permitted him to deal on credit.

Where the rules of a coal club were framed so as to make the secretary of the club the agent of all the members for ordering coals, and provided for payment of the coals ordered by an order on the treasurer, signed by the secretary and the chairman of the next meeting held after the delivery of the coals, it was held that the secretary was authorized to pledge the credit of the members, and that they were all responsible for the payment of coals ordered by the secretary. (s) But members of a club [*111] are not responsible * upon bills of exchange, or for the repayment of money lent, unless they have expressly sanctioned the drawing or acceptance of bills, or the borrowing of money ; (t) nor are they responsible upon contracts made by their secretary or one of their members out of the ordinary course of business, without their knowledge. If goods have been furnished by the orders of one only of the members of the committee of management, it is a question for the jury to determine whether the goods were furnished upon the personal and individual credit of the party actually ordering them, or with the authority and on the credit of the whole body of persons managing the institution. (v)

Contracts with Trustees and Commissioners of Public Works.—Commissioners and trustees acting in the execution of statutory powers are generally exempted from all personal liability whilst acting within the scope of the statute they are authorized to execute, but are liable to be sued in the name of their clerk or treasurer for the time being ; and the public funds in their hands, derived from rates they are authorized to impose, are subjected to the payment and satisfaction of claims proved against them. (x)

(s) *Cockerell v. Aucompte*, 2 C. B. N. s. 440; 26 L. J. C. P. 194.

(t) *Earl Mountcashel v. Barber*, 14 C. B. 53; 33 L. J. C. P. 43.

(u) *Todd v. Emly*, 7 M. & W. 427; 8 M. & W. 505; *ante*, pp. * 107, * 109.

(v) If a contract made by them is within the scope of the act to be executed by them, the procedure for the

breach of such contract must be against the clerk, and the amount recovered must be paid out of the public moneys in the hands or under the control of the commissioners. *Hall v. Taylor*, 1 Ell. Bl. & Ell. 113. If judgment is recovered against the officer authorized to be sued, and the commissioners neglect to satisfy the judgment, they may be com-

But although trustees and commissioners of public works have a public fund at their disposal, or may be authorized to impose tolls or make rates and assessments, and so collect money for their purposes, they may nevertheless pledge their own personal credit for the fulfilment of the contract they enter into. If they have * borrowed money not in conformity [*112] with their borrowing powers, or have exceeded their borrowing powers, and have failed consequently to charge the fund at their disposal with the repayment of the loan, and have given the lender no remedy against the rates, tolls, or assessments they are authorized to levy, they may become personally liable, either on the ground that the money was borrowed on their own personal credit, and not on the credit of the fund, (y) or that they falsely represented to the borrower that they had funds at their disposal for the repayment of the loan, (z) or that they undertook to provide funds for the purpose. They may also contract for supplies of goods, and for work and services, and may hire laborers, under circumstances giving rise to an irresistible presumption that the goods were furnished and the work

pelled by *mandamus* to make a rate and apply it in satisfaction and discharge of the judgment debt. *Reg. v. Rotherham, &c.*, 27 L. J. Q. B. 156; *Ward v. Lowndes*, 29 L. J. Q. B. 40. Where a debt is due, the creditor is entitled to judgment, although there may be no funds for the payment of it, and the creditor may consequently never be able to enforce his judgment by execution. *Bush v. Martin*, 2 H. & C. 311; 33 L. J. Ex. 17. Where, by the Lunatic Asylums Act (8 & 9 Vict. c. 126), a select number of justices, called "the committee of visitors," were empowered to contract for plans for the erection of a lunatic asylum, and were enabled to sue and be sued in the name of their clerk, and provisions were made for raising funds by subscriptions and by rates, and resolutions were passed at meetings of the committee offering premiums for plans, specifications, and drawings, and appointing an architect, it was held that the committee might be sued in the name of their clerk upon the

contracts authorized by these resolutions (*Kendall v. King*, 17 C. B. 483; 25 L. J. C. P. 132; *Cane v. Chapman*, 5 Ad. & E. 652), but that the members of the committee could not be made personally liable upon such contracts (*Allen v. Waldegrave*, 8 Taunt. 566; 2 Moore, 621), nor could execution upon a judgment recovered against the clerk be issued against him. *Wormwell v. Hailstone*, 4 M. & P. 512; 6 Bing. 668; but see *Cobbett v. Wheeler*, 7 Jur. n. s. 260. As to loans for public works, see 38 & 39 Vict. c. 89, amended by 39 & 40 Vict. c. 31, extended by 40 & 41 Vict. c. 19; 41 Vict. c. 18; 42 & 43 Vict. c. 77; 43 & 44 Vict. c. 1. As to loans by Metropolitan Board of Works, see 38 & 39 Vict. c. 65; 39 & 40 Vict. c. 55; 40 & 41 Vict. c. 42; 41 & 42 Vict. c. 37; 42 & 43 Vict. c. 25; 44 & 45 Vict. c. 48.

(y) *Parrot v. Eyre*, 3 M. & Sc. 857; 10 Bing. 283.

(z) *Higgins v. Livingstone*, 4 Dow. 355; *Eaton v. Bell*, 5 B. & Ald. 41.

was done on the personal credit of those who gave the order or made the contract, and that the vendor or the workman looked to them for payment, and not to the funds they were authorized to collect. (*a*)

Salaries of Public Officers. — Public officers appointed by trustees and commissioners of public works, under the authority of acts of parliament providing that their salaries shall be paid out of the rates to be raised under the authority of the act, cannot render the persons who make the appointment personally responsible for the payment of the salary, unless they have expressly contracted to pay it. (*b*) The only claim of such officers is against the rates; and, these failing, they must go unpaid. (*c*) When commissioners of public works, authorized by statute to appoint an officer, are directed to pay him a salary, they impliedly contract, on making the appointment, to pay the salary out of the funds they are directed to administer, so as to give the officer who has accepted the appointment a right to sue them in the name of their clerk or treasurer, (*d*) and proceed to obtain payment out of the appointed fund; but the commissioners do not incur any personal liability by virtue of the appointment, unless they have entered into an express contract to pay the salary. Whenever a public body is invested with a discretionary power respecting the amount of remuneration to be paid for a particular service, and no express contract has been entered into by the board to pay any particular sum, the court cannot interfere with the exercise of their discretion.

Contracts with Local Boards of Health. — The Public [* 113] Health Act * 1875, (*e*) by sect. 173, gives power to any local authority to enter into any contracts necessary for carrying the act into execution, and by sect. 174, as to contracts by urban authorities, if over £50, they are to be in writing sealed with the common seal (*f*), and to specify the work, the price,

(*a*) *Horsley v. Bell*, Amb. 770; 1 Ham Un., 10 Exch. 875; *Addison v. Bro. C. C.* 101, n.; *Lambert v. Knott*, 6 D. & R. 122. (*d*) *Hall v. Taylor*, 1 Ell. Bl. & Ell. 113.

(*b*) *Bogg v. Pearse*, 10 C. B. 534; 20 L. J. C. P. 99; *Alexander v. Warman*, 6 H. & N. 100.

(*e*) 38 & 39 Vict. c. 55.

(*f*) *Hunt v. Wimbledon Local Board*, 3 C. P. D. 208; *ante*, pp. * 90, * 93.

(*c*) *Andrews v. Dally*, 4 Bing. 566; 1 M. & P. 490; *Smart v. Guard. West*

the time, and the penalty. An estimate is to be obtained and a report made before a contract of £100 is made, ten days notice and tenders are to be given, and security to be taken. Such contracts duly made will be binding on such authority and their successors, and all other parties, subject to a proviso as to compounding. Power to purchase land is given by sects. 175–178, and the mode of reference to arbitration by sects. 179–181. Powers of borrowing money are given to any local authority by sects. 233–244. (*g*)

It was held with regard to the former acts that many of the requirements contained in the statutes were directory only, and a strict compliance with them was not to be treated as a condition precedent to the liability of the board upon the contracts they had entered into; for the parties with whom they contracted had no means of ascertaining whether every minute requirement of the statute had been complied with by the board prior to the making of the contract. (*h*) The contract was, however, required to be in writing, and sealed with the common seal, in order to render the contract binding upon the rates. (*i*) Where the members of a local board of health resolved to oppose a gas bill promoted by a public company, and employed parties to make experiments and to give evidence before a committee of the House of Commons, it was held that the members of the board who had acted in their corporate capacity could not be made personally liable to the parties they had employed. (*k*) Where a local board entered into a contract for certain work to be done to a street, “the contractor to be paid for the work when and as the money is collected from the owners of the property adjacent,” and the board was unable to collect the necessary funds from the owners by reason of the notices served upon them proving informal, it was held that there was an implied undertaking on the part of the board to do all things necessary to enable them to fulfil the contract, and that their inability by

(*g*) See also the Local Loans Act, 1875, 38 & 39 Vict. c. 83.

(*h*) *Nowell v. Mayor, &c. of Worcester*, 9 Exch. 467; *Cunningham v. Local Board of Wolverhampton*, 7 Ell. & Bl. 113.

(*i*) *Frend v. Dennett*, 4 C. B. N. s. 583; 27 L. J. C. P. 314.

(*k*) *Bailey v. Cuckson*, 32 Law T. R. 124; 7 W. R. Q. B. 16.

reason of the defective notice to collect the necessary funds was no answer to an action by the contractor to recover the cost of the works. (*l*)

[*114] * **Contracts with Parish Officers.** — Agreements entered into by churchwardens and parishioners will, under certain circumstances, be binding upon the parish. Thus, where the plaintiff's house was so near the church that the five o'clock bell rung in the morning disturbed her, and it was agreed between her and the churchwardens and parishioners in vestry assembled, that a cupola and clock should be erected by her on the church, and that, in consideration of this being done, the five o'clock bell should not be again rung during her life, and the cupola and clock were accordingly erected, and the bell was silenced for two years, after which time it was rung again, the Court of Chancery held that the agreement was binding upon the parish, and granted an injunction against the ringing of the bell. (*m*) But as churchwardens, overseers of the poor, and parish officers have no power of contracting so as to give any right of action against the parish, they are themselves personally responsible upon all contracts entered into by them in the exercise of the duties of their office, (*n*) unless the party they have contracted with agrees to look exclusively to the funds of the parish for payment. (*o*) Where the plaintiff, a baker, supplied bread to the workhouse for the use of the poor, and all the churchwardens and overseers had, at one time or another, concurred in and assented to the orders given for the bread, it was held that they were all equally responsible to the plaintiff for the payment of the price of it. (*p*)

Where several parishioners attending at a vestry signed resolutions authorizing the churchwardens to cause the tower of the parish church to be repaired, and the repairs were done, and a rate was made for defraying the expenses, but this rate was quashed, and one of the churchwardens was sued by the workman, and compelled to pay the whole cost of the repairs, and

(*l*) *Worthington v. Sudlow*, 34 L. J. Q. B. 131.

(*m*) *Martin v. Nutkin*, 2 P. Wms. 266.

(*n*) *Kirby v. Banister*, 5 B. & Ad. 1069; *Crew v. Petit*, 3 N. & M. 456.

(*o*) *Marsh v. Davies*, 17 L. J. Ex. 94; *ante*, p. *108.

(*p*) *Lambert v. Knott*, 6 D. & R. 122.

then brought his action against the other churchwarden who had concurred in the orders, for contribution, it was held that he was entitled to recover from him a moiety of the amount he had been compelled to pay. (*q*) But there is no authority from one parish officer to bind another, resulting from the mere tenure of office. One churchwarden, for example, has no authority as such to pledge the credit of his co-churchwardens for repairs to the parish church; and if he gives orders without their knowledge and concurrence, he cannot involve them in the liability incurred in respect of the execution of such orders. (*r*) A mere honorary churchwarden, who takes no active part in the management of the parish affairs, but devolves all the * duties [* 115] of the office upon a paid colleague, cannot be made responsible for the acts and orders of the latter. And an overseer who directs money or goods to be supplied by a third party to certain poor people, cannot make his co-overseers responsible for the payment of the goods, unless they have expressly or impliedly concurred in such orders or directions, either by being present when they were given, or by being in the habit of attending meetings of the overseers and relieving officers, at which orders and directions of that description were in the habit of being given, as previously mentioned. Whether the ordering of goods or the hire of servants by one parish officer for the use of the parish creates a contract binding upon his colleagues, is a question of fact depending upon the particular circumstances of each case. (*s*) If a debt is incurred by overseers for legal proceedings in respect of parish business, their personal liability in respect thereof is not transferred, by the 11 & 12 Vict. c. 91, to their successors in office. (*t*)

Overseers of the poor are bound to take care of casual poor within their parishes; and the law obliges them to reimburse a private individual for expenses necessarily incurred by him in procuring relief and medical attendance for a casual pauper on any sudden emergency. (*u*) If an accident happens in the parish

(*q*) *Lanchester v. Tricker*, 8 Moore, 3 Stark. 65; *Malkin v. Vickerstaff*, 3 B. & Ald. 89.

(*r*) *Northwaite v. Bennett*, 2 Cr. & M. 316. (*t*) *Chambres v. Jones*, 19 L. J. Ex. 238.

(*s*) *Eaden v. Titchmarsh*, 1 Ad. & E. 691; 3 N. & M. 712; *Massey v. Knowles*, (*u*) *Simmons v. Wilmott*, 3 Esp. 91.

of A to a pauper belonging to the parish of B, which disables the pauper, and he is then removed to his own place of abode in his own parish of B, and attended by the surgeon of that parish, the surgeon may maintain an action against the officers of the parish of A, where the accident happened, to recover a reasonable compensation for his medicine and attendance. (*x*) But the law raises no implied promise from one parish to another in respect of relief and necessities afforded to casual poor, (*y*) unless the parish sued has, in some shape or another, sanctioned or authorized the relief. (*z*) An agreement by the churchwardens, overseers, and surveyors of a parish for a lease of land to be converted into gardens for the occupation of the poor is a personal contract of their own upon which they are individually liable; and they may, consequently, be sued for the rent agreed to be paid to the owner, or for use and occupation, although they have ceased to be parish officers. (*a*)

Moneys borrowed by poor-law guardians may be made a charge on the common fund under the provisions of the 32 & 33 Vict. c. 45, in the manner therein provided.

[* 116] * By the 30 & 31 Vict. c. 106, sect. 13, guardians may, with the approval of the Poor Law Board, hire, or take on lease, temporarily, or for a term of years not exceeding five, any land or buildings for the purpose of the relief or employment of the poor, and the use of the guardians or their officers without any order of the Board under seal.

The right of action in respect of parish lands and hereditaments is regulated by act of parliament, and is vested either in the churchwardens and overseers of the poor of the parish for the time being, who are empowered to take and hold parish lands in the nature of a body corporate, (*b*) or in the guardians of parishes and unions under the 5 & 6 Vict. c. 57, sect. 16, whereby it is enacted that it shall be lawful for every board of guardians constituted under the 4 & 5 Will. IV. c. 76, "to accept, take, and hold, on behalf

(*x*) *Tomlinson v. Bentall*, 5 B. & C. 745, 8 D. & R. 493; *Lamb v. Bunce*, 4 M. & S. 275.

(*y*) *Atkins v. Banwell*, 2 East, 505.

(*z*) *Paynter v. Williams*, 1 Cr. & M. 815.

(*a*) *Uthwatt v. Elkins*, 13 M. & W. 772, 777, 5 & 6 Vict. c. 57.

(*b*) 59 Geo. III. c. 12, sect. 17; *Doe v. Harpur*, 2 D. & R. 708.

of the union or parish respectively for which they may act, any lands, buildings, goods, effects, or other property, as a corporation and in all cases to sue and be sued in their corporate name." The 59 Geo. III. c. 12, sect. 17, vests in the churchwardens and overseers of the parish all buildings, lands, and hereditaments belonging to such parish, not merely where the profits thereof are applicable to the relief of the poor, but where they are applicable to those purposes for which church rates are levied. (c) If lands and tenements have been originally conveyed to trustees upon trust to apply the rents and profits thereof for the benefit of the poor or towards the repair of the parish church, and the trustees die, and there are no known trustees in existence, the legal estate vests in the churchwardens, and they are the proper parties to bring an action for the rent and for the use and occupation of the property; but when there are known trustees in existence, their estate is not divested by the statute and transferred to the churchwardens and overseers, and the latter cannot consequently sue in respect of such lands. (d) The right of action upon certain bonds and securities given to churchwardens and overseers of the poor under the 59 Geo. III. c. 12, sect. 7, continued vested in the churchwardens and overseers for the time being, notwithstanding the 7 & 8 Vict. c. 101, sect. 61. (e) Vestrymen who attend parish meetings, and concur in and sign resolutions for the repairs of the church or the parish roads, for the purpose of setting the churchwardens and surveyors in motion and authorizing them to act on behalf of the parish, do not incur any individual liability in respect of the carrying out of such resolutions, * and of the orders given by the parish officers founded [* 117] thereon. They have not, like churchwardens, the power of making a rate to provide a fund for defraying expenses; and it is notorious that they attend merely for the purpose of authorizing certain things to be done which are to be paid for by a rate upon the parish; and their own individual credit and responsibility are not considered to be in anywise pledged for the payment of the expenses incurred in carrying the vestry resolutions

(c) *Alderman v. Neate*, 4 M. & W. 9 Ad. & E. 255; *Ward v. Clarke*, 12 704. M. & W. 747.

(d) *Churchwardens of Deptford v. Skelton v. Ruskby*, 4 Exch. Sketchley, 8 Q. B. 394; *Allason v. Stark*, 545.

into effect. (*f*) But vestrymen, in vestry assembled, may, like any other persons, exceed their duties as vestrymen, and give their own personal undertaking in respect of the affairs of the parish. Thus, where twenty-four persons in vestry assembled signed a guarantee which was entered in the vestry minute-book to the following effect: "At a vestry meeting held, &c., it was moved and seconded by, &c., that this meeting do highly approve of the proceedings taken by the present surveyor, &c., and do hereby guarantee to him all legal expenses that are or may be hereafter incurred by him in prosecuting the said suit," it was held by Lord Tenterden that all the vestrymen who had signed the guarantee so entered in the vestry minute-book had rendered themselves personally responsible for the fulfilment of their engagement. (*g*)

Surveyors of turnpike-roads, being the mere servants or agents of the commissioners, are not themselves in general responsible for the payment of the contractors and laborers employed upon the road. (*h*)

Friendly Societies. — Contracts with friendly societies are regulated by the 38 & 39 Vict. c. 60, amended by 39 & 40 Vict. c. 32, and 42 Vict. c. 9. (*i*)

Loans to Friendly Societies. — Where money has been lent to the directors and recognized officers or agents of a friendly society, and the money has come to the use of the society, and the members have had the benefit of the loan, the society cannot exempt itself from responsibility by showing that the directors have exceeded their borrowing powers, or that certain prescribed formalities annexed to those borrowing powers have not been complied with. (*j*)

Industrial and Provident Societies. — Contracts with industrial and provident societies are regulated by the 39 & 40 Vict. c. 45. By the 11th section of that act, sub-section (3), all moneys payable by a member to the society shall be a debt due [* 118] from such * member to the society, and shall be recover-

(*f*) *Lanchester v. Tricker*, 8 Moore, 20; 1 Bing. 201; *Lanchester v. Frewer*, 9 Moore, 688; 2 Bing. 361; *Sprott v. Powell*, 11 Moore, 398; 3 Bing. 478.

(*g*) *Heudebowick v. Langton*, 3 C. & P. 571.

(*h*) *Pochin v. Pawley*, 1 W. Bl. 670.

(*i*) As to contracts which are unauthorized but not illegal, see *In re Coltnan*, 19 Ch. D. 64.

(*j*) *Pare v. Clegg*, 30 L. J. Ch. 747; 29 Beav. 589.

able as such, either in the County Court of the district in which the registered office of the society is situate, or that of the district in which such member resides, at the option of the society ; and by sub-section (12), contracts on behalf of the society may be made, varied, or discharged as follows :—

- (a) Any contract, which if made between private persons would be by law required to be in writing, and if made according to the English law to be under seal, may be made on behalf of the society in writing under the common seal of the society, and may in the same manner be varied or discharged :
- (b) Any contract, which if made between private persons would be by law required to be in writing and signed by the persons to be charged therewith, may be made on behalf of the society in writing by any person acting under the express or implied authority of the society, and may in the same manner be varied or discharged :
- (c) Any contract under seal, which if made between private persons might be varied or discharged at law or in equity by a writing not under seal signed by any person interested therein, may be similarly varied or discharged on behalf of the society by any person acting under the express or implied authority of the society :
- (d) Any contract, which if made between private persons would be by law valid, though made by parol only and not reduced into writing, may be made by parol on behalf of the society by any person acting under the express or implied authority of the society, and may in the same manner be varied or discharged :
- (e) A signature purporting to be made by a person holding any office in the society attached to a writing whereby any contract purports to be made, varied, or discharged by or on behalf of the society, shall *prima facie* be taken to be the signature of a person holding at the time when the signature was made the office so stated :

And all contracts which may be or have been made, varied, or discharged, according to the provisions herein contained, shall, so far as concerns the form thereof, be effectual in law and binding on the society, and all other parties thereto, their heirs, executors, or administrators, as the case may be.

The dissolution and winding up of such societies is provided for by sect. 17.

[* 119] * It was held that under the former acts an industrial and provident society was not liable to be sued in its corporate capacity for goods supplied before the registration, although the action was not brought until after registration. (*k*) Such an action should have been brought against the committee of management. (*l*) But a society formed under the 15 & 16 Vict. c. 31, and afterward registered under the acts subsequently in force, might sue in its corporate name upon a bond given to the trustees of the society before the passing of the latter acts. (*m*) Members of an unregistered society enrolled and certified under the old act (15 & 16 Vict. c. 31), giving a promissory note in the following form for a debt of the society: "Twelve months after date, we, the undersigned, being members of the executive committee on behalf of the L. and S. W. Railway Co-operative Society, do jointly promise to pay," &c., were held personally liable. (*n*)

Contracts with Benefit Building Societies are regulated by the 6 & 7 Wm. IV. c. 32 (societies before 1874), and the 33 & 34 Vict. c. 97, sect. 112 (stamps); and 37 & 38 Vict. c. 42; 38 & 39 Vict. c. 9; 40 & 41 Vict. c. 63. A rule empowering the trustees to borrow a limited amount of money for the purposes of the society was held not illegal under the old acts. (*o*) But now these societies have power under the above acts to borrow money. (*p*) Parties who sign promissory notes, or expressly contract in their own names for the repayment of money advanced to a benefit

(*k*) *Linton v. Blakeney Joint Co-operative Industrial School*, 3 H. & C. 853; 34 L. J. Ex. 211. *Pickles*, 3 H. & C. 857; 35 L. J. Ex. 1; L. R. 1 Ex. 1.

(*l*) *Dear v. Mellard*, 32 L. J. C. P. 252; 15 C. B. N. S. 19; *Toutill v. Douglas*, 33 L. J. Q. B. 66. (*n*) *Gray v. Raper*, L. R. 1 C. P. 694.

(*o*) *Laing v. Reed*, L. R. 5 Ch. 4.

(*p*) See 37 & 38 Vict. c. 42, sect. 15.

(*m*) *Queensbury Industrial Soc. v.*

building society, cannot exonerate themselves from personal liability upon their contract merely by describing themselves on the face of it as "trustees" or "secretary" for the society. (*q*)

The total amount of the loan must not at any time exceed two thirds of the amount secured by mortgages from its members. (*r*) Formerly, even where there was a power given by the rules to borrow money, it was necessarily limited; an unlimited power of borrowing is invalid. (*s*)

Contracts with Freehold Land Societies.—There is a great distinction between a freehold land society and a benefit building society. A freehold land society buys land with the funds contributed by the members of the society, and then divides it amongst * them; but a benefit building society [* 120] advances to its borrowing members money derived from the subscriptions, which the borrowing members themselves lay out in the purchase of lands or buildings, and then mortgage them to the society. A freehold land society, whose rules authorize the directors to make speculative investments of the funds of the society in the purchase of estates, to be partitioned and divided amongst the members, cannot be registered as a benefit building society, as its objects are totally different from those of a benefit building society; and both the directors or trustees who enter into contracts for the purchase of estates, and the members or shareholders who authorize them to be made, may become personally responsible for the fulfilment of such contracts. (*t*)

Salaries of Officers of Friendly Societies.—Surveyors, secretaries, solicitors, and officers of benefit building societies and industrial and provident societies generally, have notice by the rules of the society that the remuneration for their services to the society is to be paid out of the funds of the society, so that if the society becomes insolvent they have no right to resort for payment to individual members. Officers of this class generally have a much greater interest in the societies to which they are

(*q*) *Price v. Taylor*, 5 H. & N. 542; to liability of directors for money borrowed beyond the limit, see *Looker v. Ell. & Bl.* 981.

(*r*) Sect. 15.

Wrigley, 9 Q. B. D. 397.

(*t*) *Grimes v. Harrison*, 26 Beav. 435;

(*s*) *Hill's case*, L. R. 9 Eq. 605. As 28 L. J. Ch. 823.

attached than the trustees or directors. In the great majority of cases, they are the persons who get the society up, and at whose request the directors consent to accept office and take upon themselves the liabilities and duties of their situation; and such officers generally discharge their duties, and perform the services rendered by them to the society, with the understanding, on all hands, that they are to be remunerated out of the funds of the society; and if the funds fail, these officers must remain unpaid. (*u*)

Contracts with loan societies are regulated by the 3 & 4 Vict. c. 110, which is made perpetual by the 26 & 27 Vict. c. 56.

Contracts with registered trades unions are regulated by the 34 & 35 Vict. c. 31, amended by the 39 & 40 Vict. c. 22. (*v*)

Contracts with Infants.¹—All individuals below the age of twenty-one years are clothed only with a qualified power of contracting. By the Infants Relief Act, 1874, (*y*) all contracts by infants, whether by specialty or simple contract, for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, are absolutely void. But this enactment [*121] does not *invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity enter, except such as then by law were voidable.

¹ For limitations of the power of infants to make contracts; the rights they may acquire and liabilities they may incur by contracting; their power to purchase necessities, and what are or are not necessities; how contracts made during infancy may be avoided or ratified; and kindred matters, see Ewell's *Lead. Cas. Infancy*, &c., 3-220; U. S. Dig. tit. *Infants*, I.; ib. Ann. 1870-1878, tit. *Infants*; ib. Ann. 1879, &c., tit. *Infants*, II.; Reeve, Dom. Rel. tit. *Parent & Child*, ch. 1-4; Schouler, Dom. Rel. Part V. pp. 518-598; Tyler, Inf. & Cov. Part I. pp. 33-142. That an infant is not liable in an action on the case for damages for inducing plaintiff, by means of false representations, to buy chattels from him, see also *Doran v. Smith*, 17 Am. L. Reg. n. s. 42, and note by E. H. Bennett, ib. 44. As to an infant's engagement to marry, and what facts occurring after majority amount to ratification, see also *Ditcham v. Worrall*, 20 Am. L. Reg. n. s. 447, and note by E. H. Bennett, ib. 459.

(*u*) *Alexander v. Worman*, 6 H. & N. 100; 30 L. J. Ex. 198.

(*v*) As to insurances on the lives of children, &c., sect. 28 of the 38 & 39 Vict. c. 60 (Friendly Societies Act), applies.

(*y*) 37 & 38 Vict. c. 62, sect. 1. At common law these contracts were not absolutely void, but might have been ratified by the infant on attaining his majority.

It was held that notwithstanding the above enactment, and sect. 2 (*infra*; and *post*, p. * 126), an infant debtor trader might, after he has attained full age, be made a bankrupt upon an act of bankruptcy committed during infancy; (z) but this has been overruled, (a) unless, perhaps, where the infant has expressly represented himself to be of full age. (b).

The contracts of an infant are binding upon him during his minority if they are necessary, and for his benefit and advantage, but, speaking generally, may be avoided by him on his coming of age. The contracts of an infant which are not necessary or for his benefit or advantage cannot be enforced against him during his minority; but at common law they might, if not by deed, have been ratified by the infant on his arriving at full age, and could then have been enforced against him. By the 9 Geo. IV. c. 14, sect. 15, such ratification must have been in writing signed by the party to be charged therewith; and by the Infants Relief Act, 1874, (c) no action may be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or simple contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

In deciding whether a contract is or is not for the benefit and advantage of an infant, the court does not always consider the circumstances of each contract.¹⁴

It has been laid down that certain contracts can under no circumstances be enforced against an infant during his minority.

Thus, no penal obligations entered into by infants are enforceable, as it is not necessary for them, nor can it be for their benefit and advantage, to subject themselves to a penalty. (d) All deeds, also, and covenants, feoffments, grants, releases, confirmations, cognovits, or other writings under seal made by infants, are, as a general rule (subject to some few exceptions presently noticed), not binding; (e) and an infant cannot be sued on his

(z) *Ex parte* Lynch, 2 Ch. D. 229.

(a) *Ex parte* Jones, 18 Ch. D. 109.

(b) *Per* Lush, L. J., *Ex parte* Jones, *supra*; but see *post*, p. * 122, n. (l).

(c) 37 & 38 Vict. c. 62, sect. 2.

(d) Co. Litt. 172 a; *Fisher v. Mow-*

bray, 8 East, 330; *Baylis v. Dinely*, 3

M. & S. 477; *Stikeman v. Dawson*, 16

L. J. Ch. 205; see however *Wood v. Fenwick*, 10 M. & W. 195.

(e) Co. Litt. 171 b; *Oliver v. Wood-*

roffe, 4 M. & W. 650.

¹⁴ See Appendix, Vol. III.

covenant to serve contained in an indenture of apprenticeship executed by him; (*f*) nor on a bill of exchange accepted [*122] by him, although the * bill may have been accepted on account of necessities furnished to such infant; (*g*) nor on a contract of suretyship; (*h*) nor for a breach of warranty made by him on the sale of a horse; (*i*) nor is he bound by an agreement to refer disputes to arbitration, nor by the recitals in any deed executed by him during infancy. (*k*) If the infant has induced another party to contract with him by falsely representing that he was of age, he is nevertheless not precluded from setting up his infancy as an answer to any action founded on such contract. (*l*)

Contracts also entered into by infants in the exercise of a trade cannot be enforced against them; for the law does not consider it to be necessary or beneficial for infants to embark in trade and hazard their fortunes in commercial speculations. An action, consequently, cannot be maintained against an infant who carries on trade, for work done for him, or for the rent of houses and buildings hired by him in the course of that trade, although he gains his living thereby. (*m*) An agreement with an infant workman which binds him to serve during a certain term, but leaves the master free to stop his work and his wages whenever he chooses, is not beneficial to the infant. (*n*) A plaintiff cannot convert a breach of duty arising out of a contract into a tort so as to charge an infant in an action *ex delicto*. Therefore, if a horse lent to an infant is immoderately ridden by the latter and is injured, the infant is protected from liability by his infancy. (*o*) And an infant innkeeper is not liable for the

(*f*) *Gylbert v. Fletcher*, Cro. Car. 179.

(*g*) *Williams v. Harrison*, Carth. 160; *Williamson v. Watt*, 1 Campb. 551; *Harrison v. Cotgreave*, 16 L. J. C. P. 198.

(*h*) *Maples v. Wightman*, 4 Conn. 376; *Allen v. Minor*, 2 Call, 70.

(*i*) *Howlett v. Haswell*, 4 Campb. 118; *Green v. Greenbank*, 2 Marsh. 485; *Grove v. Nevill*, 1 Keb. 778.

(*k*) *Watson's Arbitr.* 40, 41, 42; *Milner v. Lord Harewood*, 18 Ves. 274.

(*l*) *Bartlett v. Wells*, 1 B. & S. 836; 31 L. J. Q. B. 57; *De Roo v. Foster*, 12 C. B. N. s. 272. But see (*b*), p. *121.

(*m*) *Dilk v. Keighley*, 2 Esp. 480; *Whittingham v. Hill*, Cro. Jac. 494; *Whywall v. Champion*, 2 Str. 1083; *Lowe v. Griffith*, 1 Sc. 458; 1 Hodg. 30; *Mason v. Wright*, 13 Met. 306.

(*n*) *Reg. v. Lord*, 12 Q. B. 765; see *Leslie v. Fitzpatrick*, 3 Q. B. D. 229.

(*o*) *Jennings v. Rundall*, 8 T. R. 335; *Green v. Greenbank*, 2 Marsh. 485.

loss of the guest's goods. (*p*) But if the act of the infant is not an abuse of a contract, but a wrong actionable *per se*, he will not be protected from the consequences. (*q*)

Rights Ex Contractu of Infants. — "Infancy is a personal privilege, of which no one can take advantage but the infant himself; and, therefore, though the contract of the infant be voidable, yet it shall bind the person of full age." (*r*) Therefore, in cases of promises of marriage, contracts of purchase and sale, and contracts for the performance of work, the adult contracting party is * bound and may be sued by the infant, [*123] although the latter has incurred no corresponding legal obligation. (*s*) But an infant cannot obtain a decree for a specific performance of a contract against an adult contracting party. (*t*) An infant cannot be compelled to complete a contract for the purchase of an estate; but if he has paid a deposit under such a contract, he cannot recover it back merely because he declines to complete the purchase. (*u*) When an infant has brought an action by his next friend, and has recovered damages which have been received by the attorney, the money is the money of the infant, and he may sue the attorney for it. (*x*)

Contracts Binding upon Infants. — Infants are not rendered absolutely incapable of contracting so as to bind themselves; for "the law, at the same time that it protects their imbecility and indiscretion from injury, enables them to do certain binding acts for their own benefit. They may grant leases when it is manifestly to their interest and advantage that leases should be granted; and they will not be permitted to avoid them when they come of age; for the privilege is given as a *shield*, not as a *sword*, and shall never be turned into an offensive weapon of fraud and injustice." (*y*) By the 11 Geo. IV. and 1 Will. IV. c. 65,

(*p*) Rolle, Abr. 1; 2 Action Sur Cas. D. 3.

(*q*) Burnard v. Haggis, 14 C. B. n. s. 45; 32 L. J. C. P. 189.

(*r*) Bac. Abr. Infants (T) 4; Farnham v. Atkins, 1 Sid. 446; Holt v. Ward, 2 Str. 937; 2 Barn. 173.

(*s*) Warwick v. Bruce, 2 M. & S. 205; 6 Taunt. 118; Forrester's case, 1 Sid. 41; 1 Keb. 1; Davis v. Manington, 2 Sid. 109.

(*t*) Flight v. Bolland, 4 Russ. 298.

(*u*) Wilson v. Kearse, Peake's Ad. Cas. 196.

(*x*) Collins v. Brook, 4 H. & N. 276; 28 L. J. Ex. 143; *Ex parte* Brocklebank, 6 Ch. D. 358.

(*y*) Zouch v. Parsons, 3 Burr. 1801; Maddon v. White, 2 T. R. 161; Allen v. Allen, 2 Dr. & W. 307, 340; Staton v. Brady, 14 Ir. C. L. 61.

sects. 16 and 17, infants are empowered to grant renewal of leases, and the Court of Chancery may authorize leases to be made of lands belonging to infants for the benefit of the estate. Therefore, if an infant contracts for necessary repairs to be done to his dwelling-house, he will not be allowed to avail himself of his infancy as an answer to a fair claim for the payment of the price of the work so done. (z) By the custom of gavelkind, an infant at the age of fifteen is reckoned at full age to sell his lands, but under great limitations and restrictions, to prevent his being defrauded. And by custom in some places, an infant seised of lands in socage may, at the age of fifteen years, make a lease for years which shall bind him after he comes of age; for the custom makes fifteen his full age for that purpose. (a)

Contracts by Infants for Necessaries. — “If an infant lives with his parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes or other real necessities of life, the child cannot bind him- [*124] self to a stranger *even for what might otherwise be allowed as necessities.” (b) If he orders clothes of a tailor, and they are sent to the father’s residence, and the latter disapproves of the proceeding and sends the clothes back, the tailor will have no claim against anybody for the payment of the price of them. He cannot sue the parent, because he has not sanctioned or authorized the contract; (c) neither can he sue the infant; for, as the latter was provided for in the father’s house, he was under no necessity of contracting for the purchase of goods on his own credit. If, however, the parent was aware of the order and of the delivery of the goods, and saw the infant using and wearing the articles, and made no objection thereto, and did not exercise his parental authority and control to prevent further supplies of such articles, this will be strong evidence to show that the father authorized the order to be given, so as to render him responsible as the principal in the transaction, and the real

(z) *Smith v. Low*, 1 Atk. 489; *Ashfield v. Ashfield*, Wm. Jones, 157.

(a) *Bac. Abr. Inf. A.*; *Co. Litt.* 45, b.

(b) *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Cook v. Deaton*, 3 C. & P. 114; *Story v. Perry*, 4 ib. 526.

(c) *Blackburn v. Mackey*, 1 C. & P. 1; *Fluck v. Tollemache*, ib. 5; *Crantz v. Gill*, 2 Esp. 472; *Rolfe v. Abbott*, 6 C. & P. 286; *Clements v. Williams*, 8 ib. 58.

purchaser of the articles through the medium of his child acting as his agent in that behalf. (*d*) If an infant is placed at a boarding-school by a parent or guardian, the master has not in general any remedy against the infant, but must resort to those with whom he agreed for the infant's board and instruction. (*e*)

Infants not residing under the Parental Roof, and not provided by their parents with the necessities of life, may bind themselves by contract to pay for their necessary meat, drink, apparel, physic, good teaching, and instruction. (*f*) It has been said that an infant may enter into a contract under seal "for his necessary meat and drink, or his necessary apparel, or his fit schooling, and shall not avoid the same;" (*g*) but such contracts would at the present day be regarded with great jealousy and suspicion. And a deed to secure the repayment of money advanced for necessities has been held voidable, although the infant was ordered to pay the money due. (*h*) The infant cannot bind himself to the payment of any particular sum for necessities, or to give any particular price for them; for the law does not leave the determination of the amount to the infant, but intrusts it to the arbitration of a jury. (*i*) From the earliest times down to the present the word "necessaries" has not been confined in its strict sense to such articles as are necessary for the support of life, but extended to *articles fit to maintain the par- [*125] ticular person in the state, station, and degree in life in which he is. (*k*) Thus, an infant may be made liable for the rent of a fit and proper lodging, (*l*) also for lace, silks, and wedding garments suitable for a person of his rank in life, (*m*) and for food, clothing, groceries, nursing, attendance, and necessities furnished to his wife and family and infant children

(*d*) *Baker v. Keen*, 2 Stark. 502; *Nichole v. Allen*, 3 C. & P. 36; *Hesketh v. Gowing*, 5 Esp. 132; *Law v. Wilkin*, 6 Ad. & E. 718; *Mortimore v. Wright*, 6 M. & W. 485.

(*e*) *Duncomb v. Tickridge, Aley, 94*; *Bac. Abr. Inf. (I.) 1.*

(*f*) *Bac. Abr. Infancy (I.)*; *Cooper v. Simmons*, 7 H. & N. 707; 31 L. J. M. C. 138.

(*g*) *Perkins, sect. 14*; *Russell v. Lee*, 1 Lev. 86.

(*h*) *Martin v. Gale*, 4 Ch. D. 428.

(*i*) *Cas. Law & Eq.* 185.

(*k*) *Peters v. Fleming*, 6 M. & W. 46.

(*l*) *Kirton v. Elliott*, 2 Bulstr. 69; *Evelyn v. Chichester*, 3 Burr. 1719.

(*m*) *Rainsford v. Fenwick*, Cart. 215; *Dalton v. Gib*, 5 Bing. N. C. 198; *Brayshaw v. Eaton*, ib. 234; 7 Se. 183.

residing with him, (*n*) but not for premises hired to carry on trade. (*o*)

Things held not to be Necessaries.¹ — The question as to what things are, and what things are not, necessaries suitable for an infant who is living away from the parental roof, and supplies his own wants from funds of which he has himself the management, is a mixed question of law and fact, to be determined by the particular circumstances of each case. There are, however, many things which cannot be necessary for the use of an infant under any circumstances, and respecting which no valid contract can be entered into. (*p*) Thus, articles of mere luxury cannot be necessaries suitable to the condition of any infant. But articles of utility; although luxurious and expensive, may be; and whether they are so or not is a question for the jury in each particular case, subject to the preliminary question whether there is evidence on which they may reasonably and properly conclude that the articles in question are necessaries. (*q*) If the infant be an invalid, and horse or carriage exercise is recommended by a medical man, and is resorted to by the infant for the restoration of his health, it will be considered necessary, and the infant will be bound to pay for it. (*r*)

Things which may, or may not, be Necessaries, according to Circumstances. — The infant's clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill, and the extent of his probable means when of age; and the nature and number of his servants and attendants will depend upon his position in society. (*s*) Expensive uniforms are necessary for infant officers in the Guards, (*t*)

¹ As to what are or are not necessaries generally, see 2 Abb. L. Dict. *Necessary*; necessaries with respect to infants, see Ewell's Lead. Cas. *Infancy*, &c., 62-75, note; Reeve, Dom. Rel. 227; Schouler, Dom. Rel. 548-552; Tyler, Inf. & Cov. sects. 69, 70; ib. sect. 73; U. S. Dig. tit. *Infants*, sects. 130-163.

(*n*) Bacon's Maxim, R. 18, p. 67, ed. 1639; Chapple v. Cooper, 13 M. & W. 259.

(*o*) Lowe v. Griffith, 1 Sc. 458; *ante*, p. * 122.

(*p*) Brooker v. Scott, 11 M. & W. 67; Wharton v. Mackenzie, 5 Q. B. 606; Burghart v. Angerstein, 6 C. & P. 698; Charters v. Bayntum, 7 ib. 52.

(*q*) Ryder v. Wombwell, L. R. 4 Ex. 32; 38 L. J. Ex. 8.

(*r*) Coleridge, J., Wharton v. Mackenzie, 5 Q. B. 612, 613.

(*s*) Alderson, B., Chapple v. Cooper, 13 M. & W. 258; Hands v. Slaney, 8 T. R. 578.

(*t*) Burghart v. Hall, 4 M. & W. 730.

and the ordinary volunteer regimentals to infant members of a volunteer corps. (*u*) Silks, furs, and velvets may be necessary for a young lady of rank * and station in [* 126] society, and a gold watch-chain and gold breast-pins for the use of the son of a gentleman of fortune. (*x*) A proper marriage settlement also is necessary for a female infant of rank and station about to be married; and she may therefore retain an attorney to draw it up. (*y*) If an infant widower gives directions for the funeral of a deceased wife, he is personally responsible for the expenses thereof; and the same liability arises in the case of an infant widow who has given an order to an undertaker for the burial of a deceased husband, although the latter may have died in insolvent circumstances. (*z*)

Infant Purchasers of Estates and Railway Shares. — An infant purchaser of real estate who has taken possession, becomes liable to all the obligations attached to the estate, to pay rent in the case of a lease rendering rent, and to pay a fine due on admission in the case of a copyhold to which the infant has been admitted, unless he has elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so. (*a*) An infant who acquires railway shares is in the same situation as an infant acquiring real estate or any other permanent interest. If the infant repudiates the shares during his infancy, or as soon as he comes of age, he is not liable for the payment of calls made during his infancy; but if there has been no such waiver or repudiation, and he continues to hold the shares after he becomes of age, he is liable for calls made on those shares during infancy, without any act of ratification on his part; and a plea of infancy at the time the calls were made is bad. (*b*) A transfer to an infant of shares in a company which becomes insolvent before

(*u*) *Coates v. Wilson*, 5 Esp. 152.

(*x*) *Dalton v. Gib*, 5 Bing. N. C. 198; *Brayshaw v. Eaton*, ib. 231; *Ford v. Fothergill*, Peake, 301.

(*y*) *Helps v. Clayton*, 17 C. B. N. s. 553; 34 L. J. C. P. 1.

(*z*) *Chapple v. Cooper*, 13 M. & W. 259.

(*a*) Co. Litt. 2, b.

(*b*) *London & North West Ry. Co.*

v. M'Michael, 5 Exch. 123; 20 L. J. Ex. 99; *Newry & Ennis Ry. Co. v. Coombe*, 3 Exch. 565; *Dublin & Wick Ry. Co. v. Black*, 8 Exch. 181; *Mitchell's case*, L. R. 9 Eq. 363; 39 L. J. Ch. 199; *Ebbett's case*, L. R. 5 Ch. 302; 39 L. J. Ch. 679.

the infant attains his majority, will be treated as a nullity, and the transferor will remain liable. (c)

Avoidance of Contracts made during Infancy. — By the Infants Relief Act, 1874, sect. 2, no action (d) shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. (e)

[* 127] This section * applies to ratifications made after the passing of the Act of Contracts, entered into before the passing of the act. (f) A judgment obtained by default, after majority, upon a bill of exchange given during minority, is a ratification within the act, and cannot be enforced in bankruptcy. (f) Where the defendant promised to marry, and afterwards, on coming of age, recognized the promise without expressly making a fresh promise, it was held that the act applied, and the plaintiff was nonsuited. (g) “If an infant make a deed, and deliver it within age, and afterwards, upon his coming of full age, deliver it again, yet the deed is void; for the deed must take effect from the first delivery, or not at all.” As regards leases, however, if the infant accepts rent from the lessee, and does acts affirmatory of the contract, the lease will *prima facie* be deemed to have been a necessary and beneficial lease, and will be valid and binding. If, on the other hand, the infant repudiates the contract on his attaining his majority, this will be evidence the other way. Where the obligation is incident to a beneficial interest in property, the obligation cannot be avoided and the interest retained. If an infant lessee remains in possession of property demised to him, and pays rent after he attains his majority, he cannot afterwards repudiate the lease. He becomes chargeable, moreover, with all the arrears incurred during his minority; for though at full age he might have departed

(c) Capper's case, L. R. 3 Ch. 458; Mann's case, ib. 459, n.

(d) See a doubt suggested in Dart's Vendors & Purchasers, as to whether the act applies to *suits* for specific performance.

(e) 37 & 38 Vict. c. 62, sect. 2.

(f) *Ex parte Kibble*, L. R. 10 Ch. 373.

(g) *Coxhead v. Mullis*, 3 C. P. D. 439; as to what amounts to a fresh promise, however, see *Northcote v. Doughty*, 4 C. P. D. 385, and *Ditcham v. Worrall*, 5 C. P. D. 410.

from the bargain, and thereby have avoided payment of the arrears which the lessor suffered to accrue during the minority, yet his continuance in possession after his full age ratifies and affirms the contract *ab initio*, and so gives a remedy for the arrears of rent incurred from the time of the contract made. (*h*) So an infant who has taken possession of land under a contract of sale, and after coming of age has continued in possession and exercised acts of ownership, cannot avoid payment of the consideration. (*i*)

Extortionate Contracts with Expectant Heirs (*k*) by creditors who take advantage of the pecuniary necessities of such heirs will be set aside, and the jurisdiction of the courts is not taken away by the 31 & 32 Vict. c. 4, sect. 1, by which no purchase (which by sect. 2 is to include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired), made *bona fide* and without fraud or * unfair dealing (*l*) of any reversionary [* 128] interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue. (*m*)

A person collaterally responsible for an infant cannot avail himself of the infancy of the principal debtor. (*n*) And the indorsee of a negotiable instrument may maintain an action against the maker or acceptor, though the indorser is an infant. (*o*)

Contracts with Young Persons: Undue Influence.—The courts will prevent young persons subject to undue influence from entering into imprudent contracts without proper advice, and

(*h*) *Baylis v. Dineley*, 3 M. & S. 477; 484, 491; *Beynon v. Cook*, L. R. 10 Ch. Bac. Abr. *Inf.* (A.); (K.) 8; *Smith v. Low*, 1 Atk. 489; *Ketsey's case*, Cro. Jac. 320; *Kirton v. Elliott*, 2 Bulstr. 69.

(*i*) *Henry v. Root*, 33 N. Y. 526.

(*k*) The doctrine extends to young people who are supposed to be well off, and where the money is lent in hope of extorting payment from the father, *Neville v. Snelling*, 15 Ch. D. 679.

(*l*) Which means an unconscientious use of the power arising out of the circumstances and condition of the parties. *Earl of Aylesford v. Morris*, L. R. 8 Ch.

(*m*) *Miller v. Cook*, L. R. 10 Eq. 641; *Tyler v. Yates*, L. R. 11 Eq. 265; *ib.* 6 Ch. 665; 40 L. J. Ch. 11, 768. See however *O'Rourke v. Bolingbroke*, 2 Ap. Cas. 814, as to the effect of the statute, *per* Ld. Blackburn; see also *Beynon v. Cook*, L. R. 10 Ch. 385; *In re Slater's Trust*, 11 Ch. D. 227.

(*n*) *Hartness v. Thompson*, 5 John. 160.

(*o*) *Hardy v. Waters*, 38 Maine, 450; *Nightingale v. Withington*, 15 Mass. 273.

of which they cannot appreciate the bearings, (*p*) and a volunteer or any person with notice taking an assignment of such contract will be liable to have the same set aside. (*q*)

Of the Obligation of Parents to provide for their Children.¹ —

By the common law, a father who gives no authority to another, and enters into no contract, is no more liable for goods supplied to his child than a brother or an uncle or a mere stranger would be. "In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person;" (*r*) but the 43 Eliz. c. 2, sect. 7, for the relief of the poor, provides that the father and grandfather, and mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges relieve and maintain every such poor person; and the 4 & 5 Wm. IV. c. 76, sect. 56, provides that all parish relief given to the wife or to a child under the age of sixteen, not being blind or deaf or dumb, shall be considered as given to the husband or parent, as the case may be, and may be treated (sect. 58) as a loan to the latter, and may be recovered in the mode thereby appointed (sect. 59). A child left to starve, therefore, must apply to the parish, and

¹ The obligation of a father to maintain his children extends to a stepchild if he has in fact taken it into his family as a child; for when a man voluntarily stands *in loco parentis* he is entitled to the rights and subject to the liabilities of the relation. *Williams v. Hutchinson*, 3 N. Y. 312; *Bradford v. Bodfish*, 39 Iowa, 681. But the obligation of a father is in general subject to the limitation that in a proper case, where the means of the father are not sufficient to enable him to give the child a proper maintenance and education, and the child has an estate of its own, the court will order an allowance to the father out of the child's estate. *Tyler, Inf. & Cov.* 2d ed. sect. 191; 5 Wait, Act. & Def. 52; 2 Kent Com. 189. Hence on settlement of accounts as guardian of one who is stepfather of his ward, the court has discretionary power, on a full presentation of all the facts, to grant him an allowance from the income of the estate for the cost of the ward's support and education. *Gerdes v. Weiser*, 54 Iowa, 591.

On the validity of contracts for the relinquishment of parents' right of custody of child to a third person, see 26 Alb. L. J. 26.

(*p*) *Kempson v. Ashbee*, L. R. 10. Ch. 15.

(*q*) *Bainbrigge v. Browne*, 18 Ch. D. 188.

(*r*) *Ld. Abinger, Mortimore v. Wright*, 6 M. & W. 487; see *Ruttinger v. Tem-*

ple, 33 Law J. Q. B. 1; 4 B. & S. 491. Where the child is living with its mother under an order of the Court of Chancery, see *Bazeley v. Forder*, L. R. 3 Q. B. 559.

the parish will compel payment of subsistence-money from the parent. (*s*)

* **Contracts with Executors.**¹—An executor may sell or [*129] pledge the assets of the testator, (*t*) and may also sell part of the assets at a fixed price to a creditor of the testator to clear the debt. (*u*) He has, in fact, complete and absolute control over the property of the testator, (*x*) notwithstanding it may be affected with some peculiar trust or equity in his hands; for the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator to which his property is legally liable before all other claims. But if the purchaser knows that the executor is converting the estate into money for an unlawful purpose, the purchase will be set aside. (*y*) Thus if a creditor of the executor buys or receives in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his debt, he is, generally speaking, a party to the breach of trust by the executor, because this sale or pledging is *prima facie* inconsistent with the duty of an executor. (*z*)

If an executor or administrator takes a bond or contract under seal in his representative character, this is an obligation strictly personal to himself, upon which he can recover only in his own right. But if the personal representatives, in the course of their administration, have themselves entered into simple contracts upon which a right of action has accrued, and the money when recovered would be assets, they may sue in their representative capacity. (*a*) Thus, where executors carry on the business of

¹ How far executory contracts made by the decedent must be performed by or are a ground of action against the executor or administrator, see *Swansey v. Breck*, 10 Ala. 533; *Eubanks v. Dobbs*, 4 Ark. 173; *Smith v. Wilmington Coal Min., &c. Co.*, 83 Ill. 498; *Ewing v. Handley*, 4 Litt. 346; *Woods v. Ridley*, 27 Miss. 119; *Davis v. Lane*, 11 N. H. 512; *Lee v. Highland Bank*, 2 Sandf. Ch. 311; *McKee v. Myers*, Add. 31; *Bland v. Umstead*, 23 Pa. St. 316; *Pringle v. McPherson*, 2 Desau. 524; *Harrell v. Witherspoon*, 3 McCord, 486.

(*s*) *Skelton v. Springett*, 11 C. B. 452; see however *Oceanic Steam Nav. Co. v. Sutherland*, 16 Ch. D. 236.

1870 (33 & 34 Vict. c. 93), sect. 14.

(*t*) *Scott v. Tyler*, 2 Dick. 712, 725.

(*u*) *Hepworth v. Heslop*, 6 Hare, 561.

(*x*) *Earl Vane v. Rigden*, L. R. 5 Ch.

663; *Basset v. Nosworthy*, 2 W. & T. Lead. Cas. Eq., 2d ed., p. 1, *et seq.*;

(*y*) *Elliot v. Merryman*, 1 W. & T.; Lead. Cas. in Eq., 2d ed., p. 45 *et seq.*

(*z*) *Keane v. Roberts*, 4 Mad. 357.

(*a*) *Heath v. Chilton*, 12 M. & W. 637; 13 L. J. Ex. 228.

their testator, the money recovered by them upon contracts effected in carrying on the business will be assets in their hands, and they may therefore sue for it in their representative capacity, (b) and it makes no difference that the materials supplied under the contract never belonged to the testator. (c) They may also maintain an action in their representative character upon all negotiable securities which have been indorsed or made payable to them as executors or administrators, or generally, or individually, if the amount when recovered will be assets in their hands. If by mistake they pay away the money, or if they sell the goods, of their testator, or carry on his business for the benefit of his personal estate and for the purpose of winding up his affairs, and enter into contracts in so doing, they may sue either in their representative capacity or in their individual character, [*130] not naming themselves *executors. (d) They should, however, upon such contracts, sue in their representative capacity, in order to protect the assets from a set-off in respect of their individual debts. (e) The title of an administrator to the effects and personal estate of the deceased, though it does not exist until the grant of administration, relates back to the time of the death, so as to entitle the administrator to sue upon an implied contract of sale in respect of goods delivered to and received by a party before the grant of the letters of administration. And if an agent sells goods in ignorance of the death of the principal, the administrator may adopt the contract, and sue upon it in his representative character as soon as he has obtained letters of administration. (f)

Interest of Executors or Administrators.—As the executors unitedly represent the person of the testator, they are all jointly interested in contracts entered into with the deceased, although some of them be infants under the age of seventeen years, (g) unless they have renounced probate, in which case the right of

(b) *Moseley v. Rendell*, L. R. 6 Q. B. 388; *Abbott v. Parfitt*, L. R. 6 Q. B. 346, explaining *Bolingbroke v. Kerr*, L. R. 1 Ex. 222; 35 L. J. Ex. 137.

(c) *Abbott v. Parfitt*, *supra*.

(d) *Aspinall v. Wake*, 3 M. & Sc. 423; 10 Bing. 51; *Grissell v. Robinson*, 3 Sc. 335; *Vanquelin v. Bouard*, 33 L. J. C. P. 78; 15 C. B. N. s. 341.

(e) *Clark v. Hougham*, 2 B. & C. 155.

(f) *Foster v. Bates*, 12 M. & W. 226;

Welchman v. Sturgis, 13 Q. B. 555.

Bodger v. Arch, 10 Exch. 340.

(g) *Foxwist v. Tremaine*, 2 Saund. 212.

representation devolves upon the others, just as if the parties making the renunciation had never been appointed executors. (*h*) But two of three co-executors may recover lands of their testator in ejectment on a joint demise by the two. (*i*) In contracts which have been entered into with the personal representatives themselves in the course of their administration, all are jointly interested if the contract has been made on behalf of all; but where three out of four executors undertook the management of the testator's concerns, and possessed themselves of his property, and directed an auctioneer to sell certain portions of the estate, and sued for the price without joining the fourth, it was held that the action was well brought by the three who had authorized the sale and were the actual parties to the contract. (*k*)

Liabilities of Executors and Administrators on their own Contracts.¹ — We have already seen that a promise by an executor

¹ Whether contracts made by the executor or administrator bind him personally or charge the estate, see *McEldery v. McKenzie*, 2 Port. 33; *Taylor v. Perry*, 48 Ala. 240; *Caldwell v. McVicar*, 12 Ark. 746; *Rush v. McDermott*, 50 Cal. 471; *Funderburk v. Gorham*, 46 Ga. 296; *McFarlin v. Stinson*, 56 Ga. 296; *Vincent v. Morrison*, 1 Ill. 227; *Dunne v. Deery*, 40 Iowa, 251; *Brown v. Evans*, 15 Kan. 88; *Hopkins v. Morgan*, 7 T. B. Mon. 1; *Nicholas v. Jones*, 3 A. K. Marsh. 385; *Livingston v. Gaussen*, 21 La. Ann. 286; *Dickson v. Compton*, 24 La. Ann. 83; *Laudry v. Delas*, 25 La. Ann. 181; *Florsheim v. Holt*, 32 La. Ann. 133; *Miller v. Williamson*, 5 Md. 219; *Ford v. Russell*, 1 Freem. Ch. 42; *Sims v. Stilwell*, 4 Miss. 176; *Long v. Shackelford*, 25 Miss. 559; *Hagan v. Barksdale*, 44 Miss. 186; *Farley v. Hord*, 45 Miss. 96; *Matter of Millenovich*, 5 Nev. 189; *Meeker v. Vanderveer*, 15 N. J. L. 392; *Ten Eyck v. Vanderpoel*, 8 Johns. 120; *Ferrin v. Myrick*, 41 N. Y. 315; *Kessler v. Hall*, 64 N. C. 60; *Kerchner v. McRae*, 80 N. C. 219; *James's Appeal*, 89 Pa. St. 54; *Nehbe v. Price*, 2 Nott & M. 328; *Jones v. Jenkins*, 2 McCord, 494; *McMahan v. Harbert*, 35 Tex. 451; *Boyd v. Oglesby*, 23 Gratt. 674; *Davenport v. First Congregational Soc.*, 33 Wis. 387.

Ordinarily debts contracted by executors and administrators are obligatory as personal obligations only, and cannot, primarily, bind the estates committed to them except in cases specially authorized by statute. *Clopton v. Gholson*, 53 Miss. 266; see also *Lester v. Matthews*, 56 Ga. 655. See also *Dickinson v. Couniff*, 65 Ala. 581; *Re Page*, 57 Cal. 238; *Barker v. Kunkel*, 10 Ill. App. 407.

In *Austin v. Monro*, 47 N. Y. 360, the New York Court of Appeals held that the contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, as for services rendered, goods and property sold and delivered, or other consideration moving between the promisee and the executor as promisor, are the personal contracts of the executor, and do not bind the estate, notwithstanding the services rendered or goods furnished or other consideration moving from the promisee are

(*h*) 20 & 21 Vict. c. 77, sect. 79.

(*k*) *Brassington v. Ault*, 9 Moore,

(*i*) *Doe v. Wheeler*, 15 M. & W. 623. 343.

to pay a debt due from his testator will not make him personally liable *de bonis propriis*, unless there be some new and valid consideration for the promise. He is chargeable only thereon in his representative character to the extent of the assets in his hands, although the promise has been put into writing and signed by him, pursuant to the statute of frauds. (l) But if the executor binds

himself by deed, without any fresh consideration, or if [* 131] he gives a * written undertaking or promise to pay the debt, founded on a new and valid consideration, such as the payment of money, the supply of goods, or the delivery of documents and evidences of title which the creditor has a right to retain, he will then be personally liable *de bonis propriis* upon the contract. (m) If the executor signs his name to a written undertaking to pay a debt due to a creditor of the deceased, in consideration that such creditor will give him time for payment, he will be personally responsible *de bonis propriis* upon this contract. (n) And if an executor gives a written undertaking signed by him to a legatee, promising to pay a legacy bequeathed to the latter in consideration that the legatee will forbear for a certain time from taking proceedings to obtain payment of the legacy, he will render himself personally responsible for the payment of the legacy, as being then a debt due from him to the legatee. (o)

If an executor signs a promissory note as executor, whereby he promises to pay a sum of money with interest to the promisee, he cannot escape from his liability for the payment of the money to the latter by showing that the amount promised to be paid was a debt due from his testator, or that it was a legacy bequeathed to the promisee, and that he, the executor, has fully

such that the executor could properly have paid for the same from the assets and have been allowed for the expenditure in the settlement of their accounts. The principle is, that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator. See also *Myer v. Cole*, 12 Johns. 349; *Demott v. Field*, 7 Cow. 58; *Reynolds v. Reynolds*, 3 Wend. 244; *Ferris v. Myrick*, 41 N. Y. 315.

(l) *Nelson v. Serle*, 4 M. & W. 795; 2 Wms. Saund. 137, n. (a); *Hamilton v. Terry*, 21 L. J. C. P. 132.

(m) *Wheeler v. Collier*, Cro. Eliz. 406; *Hamilton v. Incedon*, 4 Bro. P. C. 4.

(n) *Johnson v. Whitechott*, 1 Roll. Abr. 24; *Hawes v. Smith*, 2 Lev. 122; *Fish v. Richardson*, Yelv. 55; *Bradly v. Heath*, 3 Sim. 543.

(o) *Davis v. Reyner*, 2 Lev. 3; 1 Ventr. 120; 2 Wms. Saund. 137, n. (d.)

administered, &c.; for the giving of such a security by the personal representative to the creditor or legatee imports an agreement for forbearance, and binds him individually, and supersedes the necessity of proving assets. (*p*) If executors have effected a policy of insurance to insure the estate against loss, they will be responsible if they allow the policy to drop without consulting the parties beneficially interested or resorting to the court. (*q*) If they give orders for the funeral of their deceased testator, or adopt or sanction the acts of those who have given such orders, they will themselves be personally responsible *de bonis propriis* to the parties who have fulfilled the orders. (*r*) If the executor continues the trade of the testator, he will of course be personally responsible *de bonis propriis* upon all contracts entered into by him in carrying on such trade, although he receives no part of the profits and acts strictly as trustee. (*s*) And by the law of England executors and trustees taking shares in joint-stock companies make themselves personally liable as partners, even though they describe * themselves as [* 132] trustees; and they are deemed to have intended to bind themselves absolutely; for if it were held that persons entering into contracts with a trustee were really contracting, not with the individual, but with the trust estate, it would be necessary to examine beforehand the state and amount of the trust estate and the powers of the trustee; and it could not afterwards be dealt with or disposed of until the consequences of the contract were ascertained. (*t*) If an executor, after the death of the testator, borrows money, although for the purposes of the estate, he is only liable personally, and the lender cannot prove against the estate. (*u*) But when there is a promise by an executor, founded upon a previous contract made by the testator, the executor may be sued in his representative character so as to charge the

(*p*) Childs *v.* Monins, 5 Moore, 282; 2 B. & B. 460; Barnard *v.* Pumfret, 5 Myl. & Cr. 71; Ridout *v.* Bristow, 1 Cr. & J. 234.

(*q*) Garner *v.* Moore, 24 L. J. Ch. 687; 22 & 23 Vict. c. 35, sect. 30.

(*r*) Brice *v.* Wilson, 3 N. & M. 512; 8 Ad. & E. 349, n. (c).

(*s*) Whitman *v.* Townroe, 1 M. & S. 412; *Ex parte* Garland, 10 Ves. 119.

(*t*) Lumsden *v.* Buchanan, 4 Macq. H. L. Cas. 950; Muir *v.* City of Glasgow Bank, 4 Ap. Cas. 337; Cunningham *v.* City of Glasgow Bank, 4 Ap. Cas. 607; Cree *v.* Somerville, 4 Ap. Cas. 648; Gillespie *v.* City of Glasgow Bank, 4 Ap. Cas. 632.

(*u*) Farhall *v.* Farhall, L. R. 7 Ch. 123.

assets. (x) So he may be sued in his representative capacity for money paid to his use, but only when the matter arises out of a contract with or something done by the testator. (y)

Liability of Executors and Administrators for the Acts of each Other.¹—Upon contracts that have been entered into by the personal representatives themselves in the course of their administration they are jointly liable, if they are jointly parties to the contract, or if one of them has contracted as a recognized or authorized agent on behalf of all; but one executor has no implied authority to bind his co-executors for anything beyond the reasonable and necessary expenses for the funeral of the deceased. An infant executor is not liable upon contracts made by the personal representatives themselves in the course of their administration.

Rights of the Husband upon Contracts made with the Wife during Coverture.—By the common law the husband is entitled to the benefit of all contracts executed by the wife, and of all executory contracts made by her without his knowledge but for his benefit. (z) In some cases the husband is solely entitled to the benefit of the wife's contracts; in others he may elect to give her an interest by joining her as a co-plaintiff in any action brought to enforce them. At common law, in the case of all simple contracts made with the wife, except bills of exchange and promissory notes, the husband alone took the benefit, unless there was an express promise made to the wife, and unless the consideration upon which the promise was founded moved from her; (a) for if the wife rendered services without any [*133] express promise of remuneration * having been made to her, the husband alone was entitled to the benefit of

¹ See *Newton v. Newton*, 53 N. H. 537; *Shreve v. Joyce*, 36 N. J. L. 44; *Adair v. Brimmer*, 74 N. Y. 539; *Bryan v. Stewart*, 83 N. Y. 270; *Black's Estate*, 1 Tuck. 145; *Daily's Estate*, ib. 95; *Whitney v. Phoenix*, 4 Redf. 180; *Brown's Accounting*, 16 Abb. Pr. n. s. 457; *Bailey v. Spofford*, 14 Hun, 86; *Croft v. Williams*, 23 Hun, 102; *Kincade v. Conley*, 64 N. C. 387; *Robinson's Estate*, 7 Phila. 61; *Kilgore v. Moore*, 1 S. C. 192; *Gates v. Whetstone*, 8 S. C. 244; *Anderson v. Earle*, 9 S. C. 460.

(x) *Dowse v. Cox*, 3 Bing. 20; *Farhall v. Farhall*, *supra*; *Powell v. Graham*, 7 Taunt. 581.

(y) *Farhall v. Farhall*, L. R. 7 Ch. 123, 128.

(z) *Millard v. Harvey*, 34 Beav. 237.

(a) *Buckley v. Collier*, 1 Salk. 114.

the contract, because he was entitled to the fruits of her labor; (b) and where the personal skill of the wife did not alone form the consideration for the promise, but materials were provided which were the property of the husband, he alone could enforce the contract. (c) Thus where a husband and wife sued jointly to recover money lent by the wife, and the declaration stated a promise to them to repay the money, and alleged a breach by non-payment *ad damnum eorum*, it was held that they could not maintain a joint action, as a *feme covert* could not be possessed of money jointly with her husband. (d) So where an action was brought by husband and wife for the use and occupation of a messuage and lands, for money had and received to the use of the husband and wife, and for money due on accounts stated between them, and the plaintiff stating the promises and laying the damages to them jointly, it was held, in arrest of judgment, that the entire damage resulted to the husband, and that the action ought to have been brought in his name alone. (e)

In the case of bills and notes made payable to the wife during the coverture, the husband may take the sole benefit, (f) or he may at his option give his wife an interest therein by joining her with him as a co-plaintiff. (g) And the law is the same in the case of bonds and other personal contracts under seal entered into during the coverture with the wife separately, or with the husband and wife jointly. (h) The wife, indeed, may sue alone and recover upon a contract under seal made with her during coverture, if the coverture is not pleaded. (i) And where a married woman brought an action of debt on simple contract in her own name against a railway company for dividends due on shares standing in her name, it was held that she was entitled to

(b) *Brashford v. Buckingham*, Cro. Jac. 77, 205; *Fountain v. Smith*, 2 Sid. 128; Roll. Abr. 32, pl. 12.

(c) *Holmes v. Wood*, 1 Barn. 75, 249.

(d) *Abbot v. Blofield*, Cro. Jac. 644; *King v. Bassingham*, 8 Mod. 199.

(e) *Bidgood v. Way*, 2 W. Bl. 1236; *Johnson v. Lucas*, 1 Ell. & Bl. 659; 22 L. J. Q. B. 174; *Bond v. Maze*, 16 L. J. Q. B. 196.

(f) *Burrough v. Moss*, 10 B. & C. 558.

(g) *Phillis Kirk v. Pluckwell*, 2 M. & S. 393.

(h) *Howell v. Maine*, cited 2 M. & S. 396; *Ankerstein v. Clarke*, 4 T. R. 616; *Arnold v. Revoult*, 4 Moore, 71; 1 B. & B. 443; *Hellyer v. Grace*, Styles, 9.

(i) *Bendix v. Wakeman*, 12 M. & W. 97; *Guyard v. Sutton*, 3 C. B. 153.

recover, the non-joinder of the husband not having been pleaded in abatement. (*k*)

Rights of the Surviving Wife.¹—If the wife survives the husband, she is entitled to the benefit of all contracts under seal

¹ As every one knows, the topics in this section and the seventeen which follow it in the text have been the subject during the present generation of exceedingly varied and complex legislative changes in many of the States. It is only in a secondary sense, however, that most of the new laws on the subject of married women's dealings can be said to belong to the law of contracts. With few and slight exceptions,—and those are of local character only,—they affect the personal disability or capacity of a wife to hold and convey property and charge it for contracts made for its benefit, to engage in business and make pecuniary engagements in connection therewith, to promise her services and give receipt for compensation, and other matters of kindred nature; thus they belong primarily to the field of Persons and Personal Relations. In short, the recent legislation on the subject is addressed to the civil and social *status* of married women considered as a distinct class of persons; it does not materially affect the form, requisites, interpretation, validity, or enforcement of the various kinds of contracts known to the law, except that it, more or less fully in various States, brings wives into the class of persons competent to make them. These considerations render it proper, and the number and variety of the decisions make it necessary, to dispose of the subject by simply referring the reader to the leading general discussions.

The decisions themselves have been presented from year to year in a manner to exhibit the general nature of the statutes in U. S. Dig. tit. *Husband and Wife*; see also Ewell, *Lead. Cas.* 245–521. The chief text-books which have from time to time epitomized the progress of the law,—to mention them in chronological order, so as to show how far down they respectively extend,—are: Cord, *Legal and Equitable Rights of Married Women* (1861); Reeve, *Baron and Feme*, and other *Domestic Relations* (3d ed. 1862); Bishop, *Law of Married Women* (1871); Schouler, *Dom. Rel. Part II.*, pp. 22–303 (2d ed. 1874); *Husb. & Wife* (1882); Tyler on *Infancy and Coverture*, Part II., pp. 313–902 (2d ed. 1882). This list does not mention several esteemed works devoted more especially to marriage and divorce.

Recent magazine articles on various branches of the subject worthy of notice are: *Contracts of Married Women*, 20 *Alb. L. J.* 244; *ib.* 264; *Contracts of Wife separated from Husband, for Necessaries*, 23 *Alb. L. J.* 284; *Circumstances in which a Married Woman may act as a Feme sole*, 16 *West. Jur.* 161; note by A. C. Freeman, on reducing to possession a wife's *choses in action*, payment to husband, assignment and release by him, suit or arbitration, &c., 37 *Am. Dec.* 577; note by the same on when wife is regarded as *feme sole*, sole trader, &c., *ib.* 709; note by E. H. Bennett to *Debenham v. Mellon*, on grounds of wife's authority to bind her husband for necessities, 20 *Am. L. Reg.* 316, 324; note by H. W. Rogers to *Davis v. Smith*, 21 *Am. L. Reg.* 161, 165; note to *Nash v. Mitchell*, on contracts, &c. of married women, 3 *Abb. N. Cas.* 171, 180; articles, 6 *S. L. Rev.* 633; 7 *ib.* 68.

Somewhat more recent than either of the foregoing is a treatise wholly devoted to *Contracts of Married Women*, by John F. Kelly, Part I. of which treats, in successive chapters, of Antenuptial Contracts; Marriage and its Effects; the Wife's *Choses in Action*; the Wife's Equity; Real Property of Married Women; a Married Woman's Contracts during Coverture; a Married Woman's *Jus disponendi*; her

(*k*) *Dalton v. Mid. Ry. Co.*, 13 C. B. 474; 22 L. J. C. P. 177.

entered into during the coverture with herself alone, or with her husband and herself jointly, (*l*) but she may waive her right to *the instrument; and it then becomes the obligation of the husband alone. To a debt due on a joint judgment recovered by herself and husband during the coverture, the wife is also entitled by survivorship. (*m*) The surviving wife is entitled also to all promissory notes and bills of exchange made payable to her during the coverture, and to all express simple contracts where the promise has been made to herself during the marriage, and the consideration to support it has moved from her. (*n*) Where a *feme covert* administratrix received a sum of money in that character, and lent the same to her husband, taking in return for it the joint and several promissory notes of her husband and two other persons payable to her with interest, and the husband died, it was held that the note was a *chose in action* surviving to the wife. (*o*) As regards a simple contract, however, made with the wife alone, or with the husband and wife jointly during coverture, the husband may elect to let his wife have the benefit of it by survivorship, or he may take it himself. If in his lifetime he brings an action upon the contract in his own name, that amounts to an election to appropriate it to himself, and the wife cannot consequently in this case take it by survivorship. (*p*) If he joins his wife as a party suing on the contract, and dies, she may, by entering a suggestion of his death upon the record, prosecute the suit to judgment for her own sole use; and, even if judgment has been signed in the action so commenced prior to the husband's death, but no execution has been levied, the benefit of the judgment will survive to the wife, and she may forthwith issue execution thereon for her own use. (*q*)

Dominion over her Separate Estate and its Liability for her Contracts, &c.; while Part II., in thirty-eight chapters, devoted one to each of the several States, epitomizes the legislation and decisions of the States separately.

(*l*) 1 Roll. Abr. 349 (B.); *Coppin v. —*, 2 P. W. 496.

(*m*) Com. Dig. Bar. et Feme, F. 1; *Oglander v. Baston*, 1 Vern. 396.

(*n*) *Nash v. Nash*, 2 Mad. 133; *Gaters v. Madeley*, 6 M. & W. 423; *Fleet v. Perrins*, L. R. 4 Q. B. 500.

(*o*) *Richards v. Richards*, 2 B. & Ad. 447.

(*p*) *Scarpellini v. Atcheson*, 7 Q. B. 834.

(*q*) *Sherrington v. Yates*, 12 M. & W. 865; *Bond v. Simmons*, 3 Atk. 21; *Nanney v. Martin*, 1 Ch. C. 27.

The common law rights of the husband to the benefit of contracts made by the wife during coverture have, however, been modified by the 33 & 34 Vict. c. 93, which enables a married woman to maintain an action in her own name for the recovery of any wages or earnings acquired or gained by her after the passing of the act, in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, (r) or for any money or property acquired by her through the exercise of any literary, artistic, or scientific skill; and such wages, earnings, money, and property, and all investments thereof, are to be deemed and taken to be property settled to her separate use, independent of any husband to whom [*135] she may be married; and *her receipts alone will be a good discharge for such wages, earnings, money, and property. (s)

Under this enactment a married woman can maintain an action against her bankers for dishonoring her cheque, or for not presenting for payment a bill of exchange deposited with them for that purpose, or for not giving her notice of the dishonor of a bill of exchange entrusted by her to them. (t)

The statute gives a right to bring an action, and says that the married woman shall have the same remedies as a *feme sole*; it may be doubted whether, like a *feme sole*, she would be barred by the statute of limitations, or would come within the exceptions as a *feme covert*. (u)

Inability of Married Women to bind themselves or their Husbands by Deed.—The husband cannot be sued upon any contract under seal entered into and executed by the wife in his name or on his behalf, unless he has given her a power of attorney under seal to contract for him by deed, or unless the deed is sealed and delivered by her in his name, in his presence, and by his commandment. Neither is the wife herself liable upon the deed by reason of her coverture. (x) But if work has been performed, or services rendered, or goods supplied for the use of

(r) See *Lovell v. Newton*, 4 C. P. D. 7; *Ashworth v. Outram*, 5 Ch. D. 923.

(s) 33 & 34 Vict. c. 93, sects. 1 & 11.

(t) *Summers v. City Bank*, L. R. 9 C. P. 580.

(u) See *post*, p. *1252.

(x) *Lambert v. Atkins*, 2 Campb. 273; Cod. lib. 4, tit. 12, lex 1. As to renewals of leases by a *feme covert*, see 11 Geo. IV. & 1 W. IV. c. 65, sect. 16.

the husband upon the faith of a covenant by the wife for payment or remuneration, the husband is liable for the fair value of the work and services, and of the goods supplied, just as if the covenant had never been in existence. (*y*)

Authority of the Wife to sign Writings for the Husband. — The liability of the husband upon simple contracts made or signed by the wife during the coverture depends upon the nature of such contracts and of the things stipulated and agreed to be done. No power of attorney is requisite to enable the wife to bind the husband by simple contract; but the latter will be held liable, provided he appears expressly or impliedly to have sanctioned what she has done. (*z*) The wife is not the agent of the husband in respect of the management of his estate and business, (*a*) unless he has intrusted her with the general management of it, in which case he makes her his general agent for the carrying it on, and clothes her with an implied authority to enter into all such contracts and agreements as are usual and necessary for the purpose; and he is consequently responsible for the fulfilment of all contracts *that may [* 136] be entered into by her in the execution of her task, just as if they had been made by any ordinary general agent employed by him in the matter. (*b*) Bills of exchange and promissory notes, for example, drawn, accepted, or indorsed by a wife who is intrusted by the husband with the conduct and management of a business in the carrying on of which it is usual to negotiate such securities, are binding upon the husband; but if she is not carrying on the husband's business, it must be shown that she acted by his express authority. (*c*) The wife may be clothed with an express or implied authority to bind the husband by signing her own name as well as the husband's name; and the husband may accept bills and contract in his wife's name as well as in his own name. (*d*) A wife who has the conduct of her husband's business, and who is in the habit of drawing, accept-

(*y*) *White v. Cuyler*, 1 Esp. 200; 6 T. R. 176. By the 37 & 38 Vict. c. 78, sect. 6, a married woman who is a bare trustee may convey or surrender freehold or copyhold as if she were a *feme sole*.

(*z*) *M'George v. Egan*, 7 Sc. 112.

(*a*) *Meredith v. Footner*, 11 M. & W. 202.

(*b*) *Petty v. Anderson*, 10 Moo. 577.

(*c*) *Prestwick v. Marshall*, 5 M. & P. 513; *Cotes v. Davis*, 1 Campb. 485; Code Nap. L. 1, tit. 5, c. 6, 220.

(*d*) *Lindus v. Bradwell*, 5 C. B. 583.

ing, and indorsing bills and notes in his name, may draw and indorse by the hand of her daughter (the daughter being in her presence and acting under her immediate direction) without violating the rule *delegatus non potest delegare*. (e) The husband is not liable for any fraud of the wife which is directly connected with and dependent upon a contract. (f)

Loans of Money to the Wife.—A married woman has in general no implied authority to borrow money and charge the husband with the repayment of it. (g) But such small amounts as a wife may require upon an emergency for her household expenses, medicines, or necessities, a third party would be justified in lending her; (h) and a person who has advanced money to the wife for necessities may be entitled to stand in the place of the person who actually supplied the necessities. (i)

Sale of Goods to Married Women.—Every married woman residing with her husband, and having the general management of his house and household affairs, is presumed to be his general agent in all matters connected with the domestic economy of the house and family. She is, therefore, clothed with an implied authority from the husband to give orders for wearing apparel, furniture, provisions, and all such things as may fairly be presumed necessary for the decent maintenance of herself, her husband and family, and the general comfort and enjoyment of the household, according to the apparent circumstances and situation in life of her husband and the position in society which [*137] he allows her to * assume. (k) But a wife has implied authority to pledge her husband's credit for such things only as fall within the domestic department ordinarily confided to the wife's management, and are necessary and suitable to the style in which her husband chooses to live. (l) And this presumption of the wife's authority may be rebutted by proof that

(e) Lord v. Hall, 8 C. B. 631.

(f) Wright v. Leonard, 11 C. B. n. s. 258; 30 L. J. C. P. 365.

(g) Knox v. Bushell, 3 C. B. n. s. 335.

(h) Harris v. Lee, 1 P. Wms. 482.

(i) Jenner v. Morris, 29 L. J. Ch. 923; Davidson v. Wood, 1 De G. J. & S. 465; 32 L. J. Ch. 400.

(k) Etherington v. Parrot, 1 Salk.

118; Waithman v. Wakefield, 1 Campb. 120; Clifford v. Laton, 3 C. & P. 16; Byles, J., Jolly v. Rees, 15 C. B. n. s. 643; 33 L. J. C. P. 177.

(l) Phillipson v. Hayter, L. R. 6 C. P. 38; 40 L. J. C. P. 14; Debenham v. Mellon, 5 Q. B. D. 394, C. A.; 6 Ap. Cas. 24.

the husband had furnished her with ready money to pay for what was necessary, and had forbidden her to pledge his credit, (*m*) or that the wife had, during the husband's absence and without his knowledge, placed herself under the protection of a man with whom she was living in adulterous intercourse. (*n*) The implied authority however, to bind the husband, resulting from cohabitation, "may be discharged by the prohibition and countermand of the husband." (*o*) The wife has no implied authority to run into extravagance, and to give orders which are beyond the husband's means. If, therefore, wines and spirits, or extravagantly expensive dresses, expensive music, jewels, and articles of luxury and ornament are ordered by the wife, there must be reasonable evidence to show that the wife has made the contract with the knowledge and assent of the husband. (*p*) If a tradesman finds a wife giving extravagant orders unsuited to the husband's estate and apparent condition of life, he ought, if he intends to look to the husband for payment, to ascertain whether the latter is aware of the wife's extravagance, and whether he does or does not sanction it. (*q*) Where a married lady went to a watering-place without her husband, and ordered expensive articles of dress unsuited to her husband's circumstances, and the latter disapproved of her extravagance as soon as he was aware of it, it was held that he was not responsible for the price of the things supplied to her. (*r*) If a married woman obtains silks on credit and pawns them, the husband is not bound to pay for them, as they never came to his use; but it is otherwise if they are made up and sent home and worn by the wife in his presence. (*s*)

Proof of the Assent of the Husband to the Wife's Contracts.—But the law, whilst discouraging the covert pandering of trades-

(*m*) *Jolly v. Rees, and Debenham v. v. Teakle*, 13 C. B. 627; 22 L. J. C. P. Mellon, *supra*. 161.

(*n*) *Atkins v. Pearce*, 2 C. B. N. s. (*q*) *Montague v. Benedict*, 3 B. & C. 763; 26 L. J. C. P. 252. 631; *Lane v. Ironmonger*, 13 M. & W. 369; *Seaton v. Benedict*, 2 M. & P. 66; 5 Bing. 28.

(*o*) *Manby v. Scott*, Bridg. Judg. by 369; *Seaton v. Benedict*, 2 M. & P. 66; 5 Bing. 28.
(*p*) *Metcalfe v. Shaw*, 3 Campb. 22; (*r*) *Atkins v. Curwood*, 7 C. & P. 756.
(*s*) *Etherington v. Parrot*, 1 Salk. 118.

(*p*) *Metcalfe v. Shaw*, 3 Campb. 22; *Spreadbury v. Chapman*, 8 C. & P. 371; *Reneaux v. Teakle*, 8 Exch. 680; *Reid*

men to the extravagance of married women, expects from [*138] the * husband some exercise of his marital control for the purpose of checking such extravagance when he has the power of interference and prevention. When, therefore, a husband living under the same roof with his wife sees her attired in costly dresses and indulging in expensive ornaments, and fails to manifest his disapprobation by any active interference or opposition, making no inquiry as to where the articles come from, and giving no intimation to the tradesmen who supply them of his intention not to pay for them, he will be presumed to assent to the wife's acts and proceedings, in accordance with the maxim *qui non prohibere potest assentire videtur*. (t) "If the husband," observes Lord Ellenborough, "has any control over goods improvidently ordered by the wife, so as to have it in his power to return them to the vendor, and he does not return them or cause them to be returned, he adopts his wife's act, and renders himself answerable. Nor is it any excuse in law that the wife is unmanageable and disobedient, as he must be supposed to exercise his marital rights and to regulate her conduct." Where, therefore, the goods have not been eloiigned, but are in the house with the knowledge and sanction of the husband, it is his duty to compel their re-delivery to the tradesman, or to tender them back to him. (u) The mere circumstance, however, of the husband seeing the wife wearing some of the things ordered by her, and not objecting to them, will be no proof of his assent to the whole of an extravagant order. The fact that the wife has ordered goods of a similar description from the tradesman with the assent of the husband would be evidence that she had the husband's authority to deal with him. (x)

Of the Giving of Credit to Married Women so as to exempt the Husband from Liability. — Evidence that the wife has a separate income over which the husband has no control, that she keeps a separate banking account of her own, and that the plaintiff has taken the wife's promissory notes, or has drawn bills of

(t) Parke, B., *Morgan v. Thomas*, 8 Exch. 307; 2 Instit. 305, u.; *Morton v. Withers*, Skin. 348.

(u) *Waithman v. Wakefield*, 1 Campb. 121.

(x) *Per Thesiger, L. J.*, in *Debenham v. Mellon*, 5 Q. B. D. 403; see also 6 App. Cas. 24.

exchange on her which she has accepted in her own name, in payment of goods supplied to her, and which notes or bills have been paid when at maturity through her bankers, show that the plaintiff dealt exclusively with the wife, and gave credit to her relying upon the funds known or presumed to be at her disposal, so as to exempt the husband from responsibility. (y) In these cases the remedy of the creditor is against the separate property of the wife in the *hands of her trustee. [*139] (z) If the tradesman, at the time he deals with and trusts the wife, does not know her to be a married woman, he cannot be said to have given credit to the husband; and if articles sold to the wife under such circumstances are not necessary for the use of the wife, and have not been used by the wife with the knowledge of the husband, and have not been consumed in the husband's household, or come in any shape or way to his use, and he has not subsequently sanctioned or adopted the wife's contract, he cannot be made responsible for the payment of the price of them. (a)

Remedies of Creditors against the Separate Property of Married Women. — A married woman is incapable of binding herself by a contract; and the fact that a married woman is living apart from her husband and trading on her own account does not enable her to contract so as to give a right of action against herself. (b) A married woman is not personally liable upon any contract made by her during coverture, whether she be living with or separated from her husband, and whether the latter be an alien resident here, or, being a subject, has abjured the realm and gone beyond sea, and she has represented herself to be, and has contracted as, a widow or a *feme sole*. (c) But if the wife of an alien who has never been in England has contracted as a *feme sole* she is personally liable. (d) A married woman is not liable to the bankrupt law, even though she has separate estate, and

(y) *Bently v. Griffin*, 5 Taunt. 356; *Freestone v. Butcher*, 9 C. & P. 643; *Taylor v. Brittan*, 1 C. & P. 16, n.; *Metcalf v. Shaw*, 3 Campb. 22.

(z) *Infra*; *Latouche v. Latouche*, 34 L. J. Ex. 85.

(a) *Clifford v. Laton*, 1 M. & M. 102.

(b) *Clayton v. Adams*, 7 T. R. 605; *Marshall v. Rutton*, 8 T. R. 545.

(c) *Stretton v. Busnach*, 1 Bing. N. C. 139; *Barden v. Keverberg*, 2 M. & W. 61; *March v. Hutchinson*, 2 B. & P. 226; *Williamson v. Dawes*, 9 Bing. 292.

(d) *De Gaillon v. L'Aigle*, 1 Bos. & P. 357.

has contracted debts after marriage. (*e*) In order that a creditor may obtain payment out of her separate estate, he must join as defendants her husband (*f*) and the trustees of her settlement. (*g*) But if a married woman has the power of dealing with separate property of her own, she has the power of contracting debts to be paid out of it, and her separate property is bound by her debts, obligations, and engagements contracted with reference to and upon the faith or credit of that property; (*h*) and effect will be given to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied. (*i*) It seems to have been thought that a

[* 140] married woman * might charge her separate property in expectancy, and even that she might charge whatever property might subsequently become her separate property; (*k*) but it has now been decided that she cannot charge property in respect of which she is restrained from anticipation, (*l*) and that she can only charge such separate property as she is possessed of at the time of contracting the debt. (*m*) The manner of coming at the separate property of the wife has been by decree, to bind the trustees as to personal estate in their hands, (*n*) not by judgment against the wife personally. (*nn*) The court has decreed payment out of a wife's separate estate of notes and bills made and accepted by the husband and wife jointly, or by the wife alone during the coverture; (*o*) also of the bills of her tradesmen and solicitors, (*p*) and of debts due for rent of houses taken by her on lease. (*q*) A married woman may also be placed upon

(*c*) *Ex parte Jones*, 12 Ch. D. 484.

(*f*) *Hancock v. Lablache*, 3 C. P. D. 197.

(*g*) *Atwood v. Chichester*, 3 Q. B. D. 722.

(*h*) *Johnson v. Gallagher*, 3 De G. F. & J. 494; 30 L. J. Ch. 298; *Picard v. Hine*, L. R. 5 Ch. 276; *Lond. Chart. Bk. of Aust. v. Lempriere*, L. R. 4 P. C. 572; *Mayd v. Field*, 3 Ch. D. 587; *Godfrey v. Harben*, 13 Ch. D. 216; as to this case, see *Pike v. Fitzgibbon*, *infra*; *per Cotton*, L. J., *Davies v. Jenkins*, 6 Ch. D. 728.

(*i*) *Owens v. Dickenson*, 1 Cr. & Ph. 54; *Johnson v. Gallagher*, 3 De G. F. & J. 494; 30 L. J. Ch. 306.

(*k*) See *Flower v. Buller*, 15 Ch. D.

665, following *Pike v. Fitzgibbon*, 14 Ch. D. 837; see *infra*.

(*l*) *Pike v. Fitzgibbon*, 17 Ch. D. 454, C. A.; *Durrant v. Rickets*, *infra*. The court may charge her estate with her consent; see 44 & 45 Vict. c. 41, s. 39; *Hodges v. Hodges*, 20 Ch. D. 749.

(*m*) *Ib*.

(*n*) *Hulme v. Tenant*, 1 Br. Ch. C. 19; *Heatley v. Thomas*, 15 Ves. 596.

(*nn*) *Durrant v. Rickets*, 8 Q. B. D. 177.

(*o*) *Bullpin v. Clarke*, 17 Ves. 365; *Stuart v. Kirkwall*, 3 Mad. 387.

(*p*) *Murray v. Barlee*, 4 Sim. 82.

(*q*) *Gaston v. Frankum*, 13 Jur. 39.

the list of contributories to a company in respect of her separate estate ; for if a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which (if she were a *feme sole*) would constitute her a debtor, and in entering into such engagement she purports to contract, not for her husband but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable, and the question whether the obligation was contracted in the manner mentioned must depend upon the facts and circumstances of each particular case. (r) But the contract must be entered into on the credit of the separate estate ; for the separate estate of a married woman is not liable to pay her general debts even where it is hers absolutely. (s) A charge on the separate estate is, however, implied where any debt of hers is secured by writing ; for otherwise the writing would be a mere piece of waste paper. (s) If the engagement is not in writing, it must be proved that it was entered into with an intention on the part of the married woman of making her separate estate liable to discharge that debt ; and this intention will not be inferred from the mere circumstance of her contracting the debt. If, however, the separate property * consists of real estate only, the statute of [* 141] frauds will apply, and a writing will be necessary. (ss)

If it appears that a bond or promissory note, or any security for money, or any acknowledgment of a debt, has been obtained from a married woman by any undue influence on the part of the husband, the court would then decline to interfere to charge her separate estate ; but the exercise of such undue influence must be clearly established to repel the *prima facie* liability. (t) The rule that a *feme covert* is to be considered a *feme sole* as to her separate property, does not extend to transactions between herself and her husband. (u)

Proof of Marriage. — If parties have lived together as man and

(r) *Matthewman's case*, L. R. 3 Eq. 781; 36 L. J. Ch. 90; *Bulter v. Cumpston*, L. R. 7 Eq. 16; 38 L. J. Ch. 35; *M'Henry v. Davies*, L. R. 10 Eq. 88; 39 L. J. Ch. 866.

(s) *Shattort v. Shattort*, L. R. 2 Eq. 182.

(ss) See *post*, p. * 159.

(t) *Field v. Sowle*, 4 Russ. 112.

(u) *Milnes v. Busk*, 2 Ves. Jun. 498.

wife, and are commonly reputed to be married, this suffices to enable third parties to charge them with the duties and responsibilities that result from such a relationship; (x) and if it be proved that they have actually gone through the marriage ceremony, but that they afterwards separated, there is sufficient evidence of their standing towards each other in the relationship of man and wife, unless a divorce can be proved. No contract entered into by a married woman with a person who knows her to be married, otherwise than by deed acknowledged, or by some act in court in which she is put at arm's length from her husband, can bind her real estate, even although she has for a long time led the other party to believe that she will abide by such contract, and he has, on the faith of such belief, irrevocably abandoned valuable rights. (y) A *feme sole* trader may, by the custom of London, be sued in the courts of the city of London upon contracts made by her in the course of her trade. (z)

Release of the Husband from Liability upon the Wife's Contracts after Adultery.—Those who furnish the wife with the means of subsistence after a separation by reason of the wife's adultery have no claim against the husband in respect thereof, whether they had notice of the adultery or not at the time they furnished their goods; for the implied authority of a wife who is not living with her husband to bind her husband by her contracts for necessaries is put an end to by her adultery. (a) The previous adultery and misconduct of the husband form no excuse in point of law for the adultery of the wife. (b) [* 142] But if a condonation takes place, (c) and * the husband receives the wife back again, all her original rights are restored; and the husband cannot then refuse to support and maintain her, unless he can prove the commission of a fresh and subsequent act of adultery. (d) And if the husband con-

(x) *Mace v. Cammel*, Lofft. 782; *Edwards v. Farebrother*, 2 M. & P. 293; 3 C. & P. 524.

(y) *Nicholl v. Jones*, 36 L. J. Ch. 554; L. R. 3 Eq. 696; *Lane v. McKeen*, 15 Maine, 304.

(z) *Candell v. Shaw*, 4 T. R. 361; *Beard v. Webb*, 2 B. & P. 92; *Lewin on Trusts*, 493-499.

(a) *Cooper v. Lloyd*, 6 C. B. N. S. 524.

(b) *Govier v. Hancock*, 6 T. R. 603; and see *Needham v. Bremner*, L. R. 1 C. P. 583; 35 L. J. C. P. 313.

(c) *Keats v. Keats*, 28 L. J. P. & M.

(d) *Harris v. Morris*, 4 Esp. 41.

nives at the adultery of the wife, and continues to reside with her, or permits her to remain under his roof in charge of his children, he cannot refuse to maintain her. (*e*) If, however, during the husband's absence abroad, the wife places herself and her husband's children under the protection of a man with whom she resides and carries on an adulterous intercourse, without the knowledge of the husband, the husband is not responsible for things furnished to the children by the wife's order if he has supplied her with money adequate for the maintenance of the children. (*f*)

Desertion of the Husband by the Wife. — If the wife leaves the husband without just cause, she cannot procure subsistence elsewhere at his expense. If she has returned to a sense of duty after a short absence, the husband would be bound to receive her back; and if he refused to do so, his liability for necessities supplied to her would be revived from the time of such refusal. But if she has deserted her husband for a lengthened period, he is not bound to receive her back or maintain her; "for if it were so, wives might leave their husbands' bed in the pride of their youth, and return in their useless old age." (*g*) If tradesmen, therefore, part with their goods to a wife living separate from her husband, and then seek to charge the husband with the payment of them, the burden of proving that the separation took place under such circumstances as will entitle them to recover the price from the latter, falls upon their shoulders. (*h*) "The mischief," observes Abbot, C. J., "of allowing the ordering of goods by a married woman living apart from her husband to be *prima facie* evidence so as to charge him for them, would be incalculable." (*i*)

Desertion of the Wife by the Husband. — If the husband separates from his wife, and leaves her destitute, without being able to prove that she has forfeited her marriage rights by adultery, the law gives her a right to support herself upon the credit and at the expense of her husband; and any tradesman who at her request supplies her with necessities suitable to her station in

(*e*) Norton v. Fazan, 1 B. & P. 227 ;
Robison v. Gosnold, 6 Mod. 172.

(*f*) Atkyns v. Pearce, ante, p. *137.

(*g*) Manby v. Scott, 1 Lev. 5.

(*h*) Clifford v. Laton, 3 C. & P. 16 ;
Edwards v. Towels, 6 Sc. N. R. 641.

(*i*) Mainwaring v. Leslie, 1 M. & M.
18.

life, in contemplation of law, supplies them to the husband himself, and may recover the amount as a debt due to him from the latter. (*k*) And the wife may also pledge the husband's [*143] credit for necessaries for the *maintenance of their children of tender years, living with her against his will by the order of the court. (*l*) A person who advances to a deserted wife money to enable her to supply herself with necessaries has an equitable claim against the husband for so much of the money as is actually applied by the wife in paying for necessaries; (*m*) but if the wife has separate income of her own, adequate to her support, the husband is not then bound to maintain her; (*n*) and if the husband offers to support her, he does not "refuse to maintain her" under stat. 5 Geo. IV. c. 83, sect. 3; (*o*) but her authority to support herself at his expense is not at an end. (*oo*) The law does not, of course, sanction a wife in running into extravagance. "It makes her the husband's agent to order such things as are reasonable and necessary for herself; but it gives her no liberty to pledge his credit for anything beyond what is reasonably necessary." (*p*)

Where a wife, being violently turned out of doors and threatened by her husband, employed an attorney to exhibit articles of the peace against him, it was held that the husband was responsible for the payment of the attorney's charges; (*q*) for whenever the husband by his conduct compels the wife to appeal to the law for protection, she may charge him for the necessary expense of the proceedings as much as for the necessary food or raiment, (*r*) and her solicitor may sue for his necessary costs. (*s*) But an indictment against the husband is not necessary for the protection of the wife; and, therefore, where a husband, having ill-treated his wife, was indicted on her prosecution, and fined

(*k*) *Harris v. Morris*, 4 Esp. 41; *Bolton v. Prentice*, 2 Str. 1214.

(*l*) *Bazeley v. Forder*, L. R. 3 Q. B. 559; 37 L. J. Q. B. 237.

(*m*) *Jenner v. Morris*, 3 De G. F. & J. 45; 30 L. J. Ch. 361; *Deare v. Soutten*, L. R. 9 Eq. 151; and see *Johnston v. Manning*, 12 Ir. C. L. Rep. 148.

(*n*) *Liddlow v. Wilmot*, 2 Stark. 86; *Johnston v. Sumner*, 3 H. & N. 266; 27 L. J. Ex. 341.

(*o*) *Flannagan v. Bishop Wearmouth*, 8 Ell. & Bl. 455.

(*oo*) *Emery v. Emery*, *post*, p. *144.

(*p*) *Emmett v. Norton*, 8 C. & P. 510.

(*q*) *Turner v. Rocks*, 10 Ad. & E. 47; *Shepherd v. Mackoul*, 3 Campb. 327.

(*r*) *Brown v. Ackroyd*, 5 Ell. & Bl. 826.

(*s*) *Ottaway v. Hamilton*, 3 C. P. D. 393, C. A.

and imprisoned, and a brother of the wife advanced money to pay the expenses of the prosecution, it was held that he was not entitled to recover the amount from the husband. (*t*) The husband is not liable for expenses incurred by the wife without his sanction in procuring a deed of separation, (*u*) nor for the costs of a suit instituted on her behalf for a judicial separation, where proper care has not been taken to ascertain that the suit was rightly instituted. (*x*) But a husband has been held liable for preliminary expenses incidental to a suit for restitution of conjugal rights, and for the expenses of obtaining counsel's opinion on the effect of an antenuptial *agree- [* 144] ment for a settlement, and of obtaining professional advice as to the proper mode of dealing with tradespeople who were pressing her for payment for necessities supplied by them to her since the desertion, and of preventing a threatened distress for rent, (*y*) and for the costs necessarily incurred by the wife in filing a petition for a judicial separation, although the petition was not proceeded with, and although the course prescribed by the practice of the Divorce Court for obtaining the wife's costs was not pursued. (*z*)

What amounts to an Expulsion of the Wife by the Husband.

— If by cruelty the husband renders it morally impossible for the wife to continue to reside with him, and she accordingly leaves him, this is as much an expulsion as if he had turned her out by main force. (*a*) If the husband brings home a loose woman, and treats her as a member of his family, this is a sufficient cause for the wife's leaving him; and so is the existence and continuance of an adulterous intercourse on the part of the husband with another woman. (*b*) Whenever the wife has once left her husband under justifiable circumstances, she is not bound to return upon the invitation of the latter; and the husband's

(*t*) *Grindell v. Godmond*, 5 Ad. & E. 755.

(*u*) *Ladd v. Lynn*, 2 M. & W. 265; and see *Pearson v. Darrington*, 32 Ala. 227; *Williams v. Monroe*, 18 B. More, 514; *Johnson v. Williams*, 3 Iowa, 197.

(*x*) *Hooper, in re*, 33 L. J. Ch. 305; 2 De G. J. & S. 91; and see *Shelton v. Pendleton*, 18 Conn. 417.

(*y*) *Wilson v. Ford*, L. R. 3 Ex. 63; 37 L. J. Ex. 60.

(*z*) *Rice v. Shepherd*, 12 C. B. N. s. 322.

(*a*) *Baker v. Sampson*, 14 C. B. N. s. 383; *Blowers v. Sturtevant*, 4 Denio, 46.

(*b*) *Houliston v. Smyth*, 3 Bing. 127.

liability for necessities furnished to her cannot be determined by a request on his part that she will again return to his protection. (*c*)

Liability of the Husband for Necessaries supplied to the Wife during a Separation by Mutual Consent. — The husband is responsible for necessities furnished to the wife during the continuance of a separation by mutual consent, unless she has competent provision from him or from funds at her own disposal; if she has such a provision, it lies on the husband to show it, (*d*) and on the creditor to prove that it is insufficient. (*e*) If the wife leaves her home in consequence of a quarrel with the husband in which they are mutually to blame, and obtains lodging and the necessities of life at the hands of a third party, the husband will be responsible for the board and lodging and necessities provided for her. (*f*) Where a wife voluntarily left her husband's house, and went to reside with her brother about a mile distant, with whom she continued to live apart from her husband until her death many years after, when her brother, without any communication with the husband, buried her in a suitable manner, it was held that the brother was entitled to recover from the husband the expenses of the funeral. (*g*) But [** 145*] * in all cases of voluntary separation, unaccompanied by cruelty, the husband may put an end to his liability for necessities by requiring the wife to return to him, and prohibiting parties from continuing to give her credit; (*h*) and his liability is in all cases dependent upon the pecuniary means at the wife's disposal. (*i*) A mere covenant or agreement to make an allowance for the wife's maintenance will not of itself exonerate the husband from his liability. He must show that the covenant has been fulfilled, and that the allowance has been regularly paid, and that it is sufficient, or has been accepted by the wife as sufficient, for her suitable support. (*k*) Where a husband con-

(*c*) *Emery v. Emery*, 1 Y. & J. 505, 506.

(*d*) *Dixon v. Hurrell*, 8 C. & P. 719.

(*e*) *Johnston v. Sumner*, *ante*, p. * 134.

(*f*) *Reed v. Moore*, 5 C. & P. 200.

(*g*) *Bradshaw v. Beard*, 12 C. B. N. s. 344; 31 L. J. C. P. 273.

(*h*) *Hindley v. Westmeath*, 6 B. & C. 200.

(*i*) *Mizen v. Pick*, 3 M. & W. 481; *Tod v. Stokes*, 12 Mod. 245. As to the liability of a lunatic husband, see *post*, p. * 150.

(*k*) *Nurse v. Craig*, 2 B. & P. N. R. 148; *Burrett v. Booty*, 8 Taunt. 343.

sents to his wife living apart from him, on the terms that she shall accept an allowance, which is paid, she has no authority to pledge his credit, although the allowance is inadequate, for the consent to the separation is given upon the terms that she agrees to the adequacy of the allowance. (*l*) If the husband, from any of the preceding causes, is absolutely discharged from his obligation to maintain the wife, the latter does not, in consequence thereof, acquire any power or capacity of contracting on her own account so as to incur any liability upon her contracts. She herself remains exempt, by reason of the coverture, from all personal responsibility *ex contractu*; though he who trusts her may in general, if she has property settled to her separate use, take proceedings to make that property available for the satisfaction of her debts. (*m*)

Effect of a Decree for a Judicial Separation. — By the Divorce Act, 20 & 21 Vict. c. 85, sect. 26, it is enacted that, in every case of a judicial separation, the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contracting and suing and being sued, and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any costs she may incur as plaintiff or defendant; but where, upon any judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same has not been duly paid by the husband, he is then liable for necessaries supplied for the wife's use. (*n*) By the 21 & 22 Vict. c. 108, sect. 8, no discharge, variation, or reversal of any decree for a judicial separation is to prejudice or affect any rights or remedies which any person would otherwise have had in respect of any debts, contracts, or acts of the wife *incurred, entered into, or [*146] done, between the making of the decree and the discharge, variation, or reversal thereof. (*o*)

Orders for the Protection of the Property and Earnings of a Deserted Wife place the wife during the continuance of the order and the desertion in the like position in all respects with regard

(*l*) *Biffin v. Bignell*, 7 H. & N. 877; (*n*) *Hunt v. De Blaquiére*, 5 Bing. 31 L. J. Ex. 189; *Eastland v. Birchell*, 550.
3 Q. B. D. 432.

(*o*) See *Nicholson v. Drury Buildings*

(*m*) *Ante*, p. *139; *Murray v. Barlee*, Co., 7 Ch. D. 48. M. & K. 220.

to property and contracts, and suing and being sued, as if she had obtained a decree for a judicial separation. (*p*) Such orders are however, confined to money or property acquired by lawful industry, and do not extend to property acquired by keeping a brothel. (*q*)

Transportation of the Husband for a Term of Years operates as a suspension of the civil and marital rights of the husband during the continuance of the term of banishment, (*r*) and until he has actually returned to this country after the expiration of his sentence. (*s*) He is not, when the exile is a mere temporary exile, civilly dead; (*t*) but the effect, as regards the capacity of the wife to contract and to be sued as a *feme sole*, is precisely the same as if he were so. But a voluntary absence beyond the sea, on the part of the husband, or a compulsory absence in the service of the state, does not in anywise alter or affect the legal position of the wife. If the husband has been banished for the term of his natural life, he is civilly dead, and the wife is then remitted to the position of a *feme sole*. (*u*) If the husband is an alien enemy, he has no legal existence in this country; and so long as he remains in that position, his wife resident here is looked upon as a *feme sole*; and she is consequently liable to be sued upon all contracts entered into by her, just the same as if she were a widow. (*v*) But if he is an alien *ami*, his wife is in the same plight as any other married woman.

Death of the Husband.—The death of the husband does not render the wife responsible upon any contracts made by her during coverture; nor is she responsible upon any promise, made after the death of the husband, to pay for things furnished her in his lifetime, as such a promise is without consideration. (*y*) Contracts entered into by the wife after the death of the husband, but before it was known, are not binding on her. (*z*)

(*p*) 20 & 21 Vict. c. 85, sect. 21; 21 & 22 Vict. c. 108, sects. 6–10.

(*q*) *Mason v. Mitchell*, 3 H. & C. 528; 34 L. J. Ex. 68.

(*r*) *Ex parte* Franks, 1 M. & Sc. 11.

(*s*) *Carroll v. Blencow*, 4 Esp. 28.

(*t*) Co. Litt. 133 a.

(*u*) Co. Litt. 133 a; *Countess of Portland v. Prodgers*, 2 Vern. 104; *Ex parte* Franks, 1 M. & Sc. 11.

(*x*) *Derry v. Duchess of Mazarine*, 1 Raym. 147; but see *De Wahl v. Branne*, 1 H. & N. 178; 25 L. J. Ex. 343.

(*y*) *Meyer v. Haworth*, 8 Ad. & E. 467.

(*z*) *Smout v. Ilberry*, 10 M. & W. 1; *Blades v. Free*, 9 B. & C. 167; Poth. Obl. No. 81.

Liabilities resulting from Reputed Marriages. — “If a man,” *observed Lord Kenyon, “has permitted a woman [*147] to whom he was not married to use his name and pass for his wife, and in that character to contract debts, he is liable for her debts, whether the tradesman who furnished the goods knew the circumstance to be so or not. But this must not be taken to apply to the case of a common strumpet, who may assume the name of a person without his authority, from having casually known him; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family.”(a) And it matters not whether the man so acting is a married man or a single man. If he lives with the woman, and gives her every appearance of being his wife, the proof of a previous marriage with some other woman cannot exonerate him from liability. (b) Having once held out the woman as his wife, the reputed husband is bound, when the connection ceases, to make the termination of it notorious, in order to escape from the difficulties of his position. (c)

Contracts with Bankrupts.¹ — For the protection of persons having *bona fide* dealings with a bankrupt after the act of bankruptcy, but without notice of it, it is enacted by the Bankruptcy Act of 1869 that nothing in that act shall render invalid any contract or dealing with any bankrupt made in good faith and for valuable consideration before the date of the order of adjudication by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication. (d) The act also provides that, subject and without prejudice to the provisions of the act relating to the proceeds of the sale and seizure

¹ It will be observed that the matters mentioned in the text relate only to the operation and effect of an existing bankrupt law upon the power of various parties to make contracts; these topics have lost importance in this country, for the present time, at least, by the repeal of our bankrupt law. The effect of a discharge in bankruptcy upon any contract to which it applies — a subject of more permanent importance — is treated *post*, pp. *1243–*1247, where American cases will be mentioned.

(a) *Watson v. Threlkeld*, 2 Esp. 637. to what are protected transactions under
 (b) *Robinson v. Nahon*, 1 Camp. 245. this section, see *In re Waugh, ex parte*
 (c) *Ryan v. Sams*, 17 L. J. Q. B. 271; *Dicken*, 4 Ch. D. 524; *Ex parte Jay*, 14
 12 Q. B. 460. Ch. D. 19, C. A.; *Ex parte Richdale*,
 (d) 32 & 33 Vict. c. 71, sect. 94. As 19 Ch. D. 409, C. A.

of goods of a trader, and to the provisions avoiding certain settlements, and avoiding, on the ground of their constituting fraudulent preferences, certain conveyances, charges, payments, and judicial proceedings, the following transactions by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy: Any disposition or contract with respect to the disposition of property by conveyance, transfer, charge, delivery of goods, payment of money, or otherwise, howsoever made, by any bankrupt in good faith and for valuable consideration, before the date of the order of adjudication, with any person not having at the time of the making of such disposition of property notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication. (*e*)

Liabilities of Trustees in Bankruptcy.—If the trustee of a * bankrupt permit the bankrupt to carry on his trade for the benefit of the estate, they will be responsible for the payment of the price of goods ordered and used by him in the exercise of such trade. (*f*) But one trustee is not responsible at common law for things ordered or work done by one of his colleagues without his knowledge, sanction, or authority.

Contribution between Trustees in Bankruptcy.—If in the course of the administration of the estate the trustees enter into joint contracts and incur a joint liability thereon, and one alone is compelled to pay the whole amount due on such contracts, he has a right to an action for contribution against his co-trustee, whether the latter has or has not in his hands any funds from the bankrupt's estate. (*g*)

Contracts with Drunkards.¹—A party who makes a contract in such a state of drunkenness as not to know what he is doing,

¹ The effect of drunkenness on contracts needs to be viewed in three aspects:
1. The contract of a person who was at the time of making it actually intoxicated to such a degree as to destroy his powers of reason and reflection, is voidable because of the mental incapacity to give a valid consent, and irrespective of whether the other party to the contract co-operated in causing the intoxication. *Caulkins v. Fry*, 35 Conn. 170; *Reinskopf v. Rogge*, 37 Ind. 207; *Mansfield v. Watson*, 2 Iowa, 111; *Pickett v. Sutter*, 5 Cal. 412; *Drummond v. Hopper*, 4

(*e*) Sect. 95.

(*g*) *Hart v. Biggs*, Holt, 245; *Bevan*

(*f*) *Kinder v. Howarth*, 2 Stark. 354. *v. Whitmore*, 15 C. B. N. s. 433, 763.

cannot be compelled to perform that contract by the other party who knew him to be in that state. A man who takes an obliga-

Harr. (Del.) 327; *Jenners v. Howard*, 6 Blackf. 240; *Cummings v. Henry*, 10 Ind. 109; *Joest v. Williams*, 42 Ind. 365; *Prentiss v. Achorn*, 2 Paige, 30; *Burroughs v. Richman*, 13 N. J. L. 233; *French v. French*, 8 Ohio, 214; *Wilson v. Bigger*, 7 Watts & S. 111; *Wade v. Colbert*, 2 Mill, Const. 27, 12 Am. Dec. 652; *Lee v. Ware*, 1 Hill (S. C.), 313; *Birdsong v. Birdsong*, 2 Head, 289; *Belcher v. Belcher*, 10 Yerg. 121; *Barrett v. Buxton*, 2 Aik. 167; *Foot v. Tewksbury*, 2 Vt. 97. Either the party himself or his representatives can raise the objection. *Broadwater v. Darne*, 10 Mo. 277; *Wigglesworth v. Steers*, 1 Hen. & M. 70, 3 Am. Dec. 602. The doctrine as to degree is that the intoxication must be such as deprives the person of reason or of the knowledge of what he is doing, and renders him *non compos mentis* for the time being; mere drunkenness, disturbing the judgment but not disabling the subject from giving assent, does not exonerate from liability. *Caulkins v. Fry*, 35 Conn. 170; *Harbison v. Lemon*, 3 Blackf. 51, 23 Am. Dec. 378; *Henry v. Ritenour*, 31 Ind. 136; *Bates v. Ball*, 72 Ill. 108; *Woodson v. Gordon*, Peck, 196, 14 Am. Dec. 793; *Johns v. Fritchey*, 39 Md. 258; *Cavender v. Waddingham*, 5 Mo. App. 457; *Wade v. Colvert*, 2 Mill, Const. 27, 12 Am. Dec. 652. The doctrine applies only to express contracts or such as depend for validity on an actual assent—such as a drunken man cannot give—either proved or presumed; and does not extend to contracts imputed or raised by operation of law. See note by A. C. Freeman, 12 Am. Dec. 654; *Story*, Contr. (5th ed.) § 86. The defect may be cured by a ratification made when the party has recovered the use of his powers. *Reinskopf v. Rogge*, 37 Ind. 207; *Reiniecke v. Smith*, 2 Har. & J. 421; *Moore v. Reed*, 2 Ired. Eq. 580; *Berkley v. Cannon*, 4 Rich. 136. A deed of mortgage may be avoided either by the party or his heirs, &c., by proof that at the time of making it he was so drunk as to be destitute of understanding. *Harbison v. Lemon*, 3 Blackf. 51, 23 Am. Dec. 378; *Reinskopf v. Rogge*, 37 Ind. 207. Whether intoxication of the maker of a negotiable instrument can be proved against a subsequent holder in good faith and for value, see *Miller v. Finley*, 26 Mich. 249; *State Bank v. McCoy*, 69 Pa. St. 204; *McSparran v. Neeley*, 91 Pa. St. 17; 1 Dan. Neg. Inst. (3d ed.) 219. 2. Partial intoxication, particularly when produced by aid or connivance of the other contracting party, though not sufficient in degree to avoid the contract for incapacity, may be considered in connection with gross unfairness in the bargain, or other *indicia* of fraud, and may warrant granting equitable relief. *Burroughs v. Richman*, 13 N. J. L. 233; *Drummond v. Hopper*, 4 Harr. (Del.) 327; *Curtis v. Hall*, 4 N. J. L. 361; *Mansfield v. Watson*, 2 Iowa, 111; *Cruise v. Christopher*, 5 Dana, 181; *Warnock v. Campbell*, 25 N. J. Eq. 485; *O'Conner v. Rempt*, 29 N. J. Eq. 156; *Calloway v. Witherspoon*, 5 Ired. Eq. 128; *White v. Cox*, 3 Hayw. 79; *Hotchkiss v. Fortson*, 7 Yerg. 67; *Birdsong v. Birdsong*, 2 Head, 289; *Harvey v. Peaks*, 1 Munf. 518; *Dunn v. Amos*, 14 Wis. 106; *Story*, Eq. Jur., sects. 231, 232; 1 Pars. Contr. 383, note; *Prentice v. Achorn*, 2 Paige, 30; *Wilson v. Bigger*, 7 Watts & S. 111; *Maxwell v. Pittenger*, 2 Green, Ch. 156; *Caulkins v. Fry*, 35 Conn. 170; *Reiniecke v. Smith*, 2 Har. & J. 421; and see *Lee v. Ware*, 1 Hill (S. C.), 313; *Conant v. Jackson*, 16 Vt. 335. 3. In several of the States statutes authorize the appointment of a committee of the person and estate of a habitual drunkard, by proceedings analogous to a writ *de lunatico* or commission of lunacy. One who has been judicially found an habitual drunkard cannot, even in sober moments, make contracts binding himself or his property. *Devin v. Scott*, 34 Ind. 67; *Wadsworth v. Sherman*, 14 Barb. 169; *McDonald v. Morton*, 1 Mass. 543; *Wadsworth v. Sharpsteen*, 8 N. Y.

tion from another so circumstanced is guilty of actual fraud. Therefore where an action was brought upon a bill of exchange by the indorsee against the indorser, and the defendant pleaded that at the time he indorsed the bill he was so drunk as to be unable to comprehend the meaning or effect of the indorsement, or to contract thereby, of which the plaintiff at the time of the indorsement had notice, it was held that the plea was a good answer to the action. (*h*) But a contract made by a man in a state of drunkenness is voidable only, and not void; and there-

388; *Imhoff v. Witmer*, 31 Pa. St. 243; *L'Amoureux v. Crosby*, 2 Paige, 422; *Re Patterson*, 4 How. Pr. 34; see also *Ritter's Appeal*, 59 Pa. St. 9; *Klohs v. Klohs*, 61 Pa. St. 245.

Dr. Ray says the common law of England has never considered drunkenness alone a sufficient reason for invalidating a deed or agreement, except when carried to that excessive degree which deprives the party of all consciousness of what he is doing. Courts of equity also have strenuously refused relief in cases of moderate drunkenness, unless it were procured by the contrivance of the other party, or were made the means of obtaining some unfair advantage. The general doctrine to be derived from modern English decisions is: 1, that moderate drunkenness does not necessarily deprive the mind of the power of rational consent, is not always apparent to others, and ought not of itself to avoid any deed or contract; 2, that inasmuch as excessive drunkenness deprives a person, more or less, of the consciousness of what he is doing, and is perfectly obvious to every one, all acts executed while in this condition may be avoided at law on the ground of incompetency, and in equity on that of fraud. In this country the English practice has been followed: 21 Am. Jur. 5; and in France the courts have been governed by similar views. Pothier, *Traité des Oblig.* by Evans, 26. Writers on natural and public law have regarded drunkenness under any circumstances as a sufficient cause for avoiding any acts that may have been executed under its influence, upon the principle that the free and deliberate consent of the understanding is essential to the validity of such acts. Puffendorf, *Law of Nat. & Nat.*, c. 4, sect. 8; Ray, *Med. Jur. Ins.* sect. 558.

As to avoidance of contracts or dealings of persons who have been rendered imbecile by long-continued habits of drunkenness, though perhaps not specially intoxicated at the time of the transaction in question, see *Mansfield v. Watson*, 2 Iowa, 111; *Wilson v. Bigger*, 7 Watts & S. 111; *White v. Cox*, 3 Hayw. 79; *Birdsong v. Birdsong*, 2 Head, 289; *Conant v. Jackson*, 16 Vt. 335.

A man of weak intellect from habitual drunkenness, and incapable of managing his own affairs, may make a contract for necessities, including such things as are useful and proper for his station. He may make a contract with an attorney to have a guardian appointed for his protection under the statute; and the attorney can recover a reasonable fee from the estate of the drunkard for the value of services rendered in procuring the appointment of a guardian and for moneys expended for costs. *Darby v. Cabanué*, 1 Mo. App. 126.

(*h*) *Gore v. Gibson*, 13 M. & W. 623; 33; *Fenton v. Holloway*, 1 Stark. 126; 14 L. J. Ex. 152; *Cole v. Robins*, Bull. *Hamilton v. Grainger*, 5 H. & N. 4; N. P. 172 a; *Pett v. Smith*, 3 Campb. Poth. *Obligations*, No. 49.

fore the drunken man may, if he pleases, ratify it after he becomes sober, and it will then be binding upon him. (*i*) It has been said that a bill of exchange or a promissory note, indorsed or accepted or made by a person in a *complete* state of intoxication, cannot be enforced as against the drunkard by a *bona fide* holder who received and gave value for it on the credit of the acceptance or indorsement or signature, in ignorance of the drunkenness and of the fraudulent circumstances under which the instrument was obtained; (*k*) but this seems very doubtful, and it is clearly otherwise if the party was only partially intoxicated at the time he accepted or indorsed the instrument. (*l*)

Contracts with Lunatics.¹— If a party to a contract was at the time he entered into the engagement a lunatic or of

¹ The general principles are: 1. Mere weakness of mind alone does not impair a person's contracts; but actual insanity or idiocy existing at the time of contracting renders the contract voidable in the interest of the party or his representatives, on the ground of want of capacity to give assent. The insanity must either be general, or involve the subject-matter of the contract; a monomania on a topic not connected with the transaction impeached does not avoid it. In degree, the insanity must have been sufficient to disable the person from comprehending the nature and consequences of his act,—from transacting the particular business rationally,—and there is considerable authority for the position that it must have been of such character that the other contracting party might have detected or at least suspected it by use of ordinary care. Ratification after regaining reason may cure the defect. How far executed contracts, contracts for necessities, and rights of a purchaser for value and without notice are exempted from the doctrine is not clearly settled. 2. Delusions, intermittent insanity, weakness or imbecility of mind, and the like, insufficient in degree to impair the contract directly, may be proved in connection with unfairness of the bargain, inadequacy of consideration, or other *indicia* of fraud, as additional reason for granting equitable relief on the ground of fraud. 3. One who has been adjudicated a lunatic and for whom a committee has been appointed is thereby disabled from all ordinary dealings in the nature of executory contract, irrespective of recurrence of lucid intervals or of alleged capacity at the moment when the particular contract was made; and the inquest is a proceeding *in rem* of which all persons have constructive notice.

The decisions are too numerous to be gathered in a brief note. The whole subject is lucidly and comprehensively treated in Ordonaux's *Judicial Aspects of Insanity*, c. 6, *Of Mental Disabilities and their Effects upon Civil Rights*, which discusses undetected lunatics, conveyances by lunatics, agency, and partnership as affected by lunacy, marriages of the insane, their parol agreements, promissory notes and contracts for necessities, and defeasances of a lunatic's contract. See also 1 Abb. L. Dict. tit. *Insanity*, 4, p. 623; Ewell, *Lead. Cas. Inf., &c.*, pp. 522-720; Ray, *Med. Jur. Ins.* c. 26, 27; U. S. Dig. tit. *Contracts*, sects. 1272-1282; and *ib.* tit. *Insane Persons*; article on *Contracts of Incompetents*, 15 Alb. L. J.

(*i*) *Matthews v. Baxter*, L.R. 8 Ex. 132.

(*k*) *Sentence v. Poole*, 3 C. & P. 1.

(*l*) *Shaw v. Thackray*, 17 Jur. 1045.

[*149] unsound *mind, and any imposition appears to have been practised upon him or any advantage taken of his

292; *Wirebach v. First Nat. Bank of Easton*, 21 Am. L. Reg. N. s. 29, and note by M. D. Ewell, ib. 35; *Jones v. Jones*, 21 Am. L. Reg. N. s. 666, and note by M. D. Ewell, ib. 670; *Hough v. Hunt*, 2 Ohio, 495, 15 Am. Dec. 569, and ib. 573, note; *Hirsch v. Trainer*, 3 Abb. N. Cas. 274, and ib. 280, note.

Recent cases are: Mere feebleness of mind does not render a person incapable of making a valid contract; and a contract or deed made by a weak-minded man will not be declared void on that ground, in the absence of evidence that unfair advantage was taken of his infirmity. *Marmon v. Marmon*, 47 Iowa, 121; *Fræncke v. His wife*, 29 La. Ann. 302; *Cain v. Warford*, 33 Md. 23; and see *Wray v. Wray*, 32 Ind. 126.

Mutual assent of the parties being necessary to a valid contract, it follows that if either is at the time of unsound mind, so as to be incapable of giving such assent as the law requires, the obligations of a contract do not arise; and although such party had not previously been adjudged insane, his disability may be shown in defence of an action against him upon the contract. *Musselman v. Cravens*, 47 Ind. 1.

The (executory) contracts of persons of unsound minds, but whose unsoundness has not been judicially declared, while not void, are voidable, and in a proper case may be disaffirmed upon the removal of the disability (*Freed v. Brown*, 55 Ind. 310; *McClain v. Davis*, 77 Ind. 419; *Turner v. Rusk*, 53 Md. 65), or may be ratified (*George v. St. Louis, &c. Ry. Co.*, 34 Ark. 613).

An insane person is not bound by his contract of suretyship, even though the creditor accepted him as surety without knowledge of his incapacity. *Vau Patton v. Beals*, 46 Iowa, 62.

A party notoriously insane, whether interdicted or not, is incapable of executing a valid contract with one aware of his insanity. *So held* as to a mortgage executed by the attorney in fact of an imbecile. *Fecel v. Guinault*, 32 La. Ann. 91.

An insane person cannot be held liable for board and expense in an asylum, where the evidence shows that he was admitted under a contract with others to pay his board and expenses. *Massachusetts General Hospital v. Fairbanks*, 129 Mass. 78.

Where a person is of so unsound a mind that his want of mental capacity is apparent to any one of ordinary prudence and observation conversing with him, an exchange of property made by him is invalid, and a guardian afterwards appointed may recover his ward's property without tendering back that which was received in exchange for it. *Halley v. Troester*, 72 Mo. 73.

If the proof only shows a case of insanity directly connected with some violent disease, the party alleging the insanity must bring his evidence of continued insanity to that point of time which bears directly upon the contract impeached. *Turner v. Rusk*, 53 Md. 65.

In determining the ability of an alleged insane person to execute any particular act, the first inquiry should be: What degree of mental capacity is essential to the proper execution of the act in question? and then, Was such capacity possessed at the time by the party? *Hall v. Unger*, 2 Abb. U. S. 507; 4 Sawyer, 672, aff'd 15 Wall. 9; *Lozeau v. Shields*, 23 N. J. Eq. 509.

For the execution of a power of attorney to convey land, the party should possess sufficient mind and memory to understand the nature of the business and know the character and location of the property, and the object and effects of his act; in other words, it is essential that he should recollect that he is owner of the

infirmity by the other contracting parties, the contract will be void, as having been procured by fraud; but if the contract is a

property, be able to identify the place where it is situated, and be aware that the instrument will confer authority for a sale of it. *Hall v. Unger, supra.*

Where the form of insanity is such as does not affect the capacity to transact business, the business transactions of the party are not impaired: as where it appears that he assented to a sale of his property by his guardian with intelligent knowledge, and has received the benefit of the purchase-money. *Searle v. Galbraith*, 73 Ill. 269; *s. p. Titcomb v. Vantyle*, 84 Ill. 371.

A deed cannot be impeached on the ground that the grantor was a monomaniac, when his monomania did not extend to the subject out of which the conveyance grew, nor affect his reason or judgment in matters of business. *Burgess v. Pollock*, 53 Iowa, 273; *Lozear v. Shields*, 23 N. J. Eq. 509.

That the person was "of weak and feeble intellect and incapable of taking care of himself," is not enough. *Lawrence v. Willis*, 75 N. C. 471.

A contract to convey land was executed subsequently by giving a deed. *Held*, that if the grantor was sane when he executed the contract, his vendee took a good title in equity; if he was sane when he executed the deed the title was good in law; and although the grantor might be a monomaniac, if the contract and deed were not affected by his monomania, they would be sustained. *Ekin v. McCracken*, 11 Phila. 534.

One who while insane executed a release of a demand for damages for personal injuries, may ratify it after reason returns; and keeping the consideration received, if done with a sane recollection of the circumstances, may operate as a ratification. *George v. St. Louis, &c. Ry. Co.*, 34 Ark. 613.

Where the party has partly executed the contract, and the claim made is upon his behalf to rescind it, the fact that since the partial execution the parties cannot be placed *in statu quo*, will forbid allowing a rescission. *Wilde v. Weakley*, 34 Ind. 181; *Musselman v. Cravens*, 47 Ind. 1; *s. p. Scanlan v. Cobb*, 85 Ill. 296.

But if the contract still remains executory, the courts will not enforce it against one who is shown to have been of unsound mind when he made it. *Musselman v. Cravens, supra*, and cases cited.

A purchaser of a promissory note, payable in bank, given upon an unexecuted consideration to one who knew of the maker's disability, takes it with constructive notice of all legal disabilities of the parties, such as unsoundness of mind. *McClain v. Davis*, 77 Ind. 419.

Where A, in good faith and without information to put him on inquiry as to the sanity of B, has lent B money, A may recover the same of B, although B has afterwards, upon inquiry taken, been declared to be insane. *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541.

One who has indorsed the notes of a self-constituted agent of a lunatic to enable such agent to raise money ostensibly for the benefit of the family of such lunatic, which money was used by the agent in cultivating the farm of the lunatic, can only recover in a suit against the lunatic, upon the note signed by the agent, so much of his debt as he can show was actually expended for the necessary support of the lunatic, and such of his family as were properly chargeable upon him. *Surles v. Pipkin*, 69 N. C. 513.

Where the defence to an action was mental incapacity to make a contract and fraudulent inducement thereto, — *Held*, that it was proper to instruct the jury that, if the want of incapacity was only partial, they might nevertheless consider

fair and honest contract, and bears no symptoms of the infirmity of mind of the party sought to be charged thereon, the courts will enforce it like any other contract. (*m*) A lunatic,

whether the defendant might not more easily be deceived than a person of strong mind. *Galpin v. Wilson*, 40 Iowa, 90.

Where one of the parties to a contract at the time of its execution was laboring under mental weakness, a court of equity will investigate the consideration and determine its sufficiency, and pass upon the party's mental state and condition; and if inadequacy of consideration and mental imbecility occur, although the weakness of mind does not amount to idiocy or legal incapacity, the contract will be annulled at the instance of the proper party. In such cases it is not necessary to show that the party was actually misled by fraud or undue influence. *Cadwallader v. West*, 48 Mo. 483. See also *Wray v. Wray*, 32 Ind. 126; *Cherbonnier v. Evitts*, 56 Md. 276; *Jacox v. Jacox*, 40 Mich. 473; *Buffalow v. Buffalow*, 2 Dev. & Bat. 241.

Although a person may have been adjudged insane, yet if no conservator has been appointed and he is in the management of his business, and there is nothing about his appearance to indicate his incapacity to contract, and he purchases at a fair and reasonable price an article necessary and useful in his business, the seller having no notice of his being adjudged insane, he will be liable to pay the price he agreed to pay. *McCormick v. Littler*, 85 Ill. 62; and see *Scanlon v. Cobb*, ib. 296.

The common law rule that the estate of an insane person over twenty-one years of age and under guardianship is liable for necessary nursing and care furnished in good faith and under justifiable circumstances, is not changed by a statute providing that such person shall be deemed incapable of making any contracts, &c. This prohibits express contracts by the persons described; but their estates may be held when the law implies a contract, and are legally as well as equitably liable for necessities furnished in good faith and under proper circumstances. *Sawyer v. Lufkin*, 56 Me. 308. To nearly same effect, *Van Horn v. Hann*, 39 N. J. L. 207.

A, who had been in the habit of buying cement from plaintiff, became insane. B was duly appointed his guardian, and with the consent of the probate court continued to buy cement, which he used in carrying on the business previously conducted by A. Plaintiff had full knowledge of all the facts. *Held*, that neither A's estate nor B was liable for the price of the cement. *Western Cement Co. v. Jones*, 8 Mo. App. 373.

The deed of an insane man not under guardianship is not void, but voidable; but a deed made after the appointment of a guardian is void. *Elston v. Jasper*, 45 Tex. 409; s. p. *Nichol v. Thomas*, 53 Ind. 42; *Mohr v. Tulip*, 40 Wis. 66.

The fact that one is put under guardianship for insanity does not warrant a court in holding that an agency previously created by him is thereby terminated, it not appearing that the insanity was of that character which disqualifies a person from entering into a valid contract. Thus, where one placed his wife in charge of his business at home, and went to an asylum for inebriates to be treated, and was there put under guardianship for insanity, — *Held*, that the court should refuse to charge that the guardianship put an end to the agency of the wife, in the absence of any proof of the character of the insanity. *Motley v. Head*, 43 Vt. 638.

(*m*) *Manby v. Bewicke*, 3 K. & J. 342; *Jenkins v. Morris*, 14 Ch. D. 674.

however, will not be bound by any deed entered into by him, (*n*) unless it be shown that it was entered into during a lucid interval; and if it be a necessary and beneficial contract for him to enter into, such as a lease of his lands at an advantageous rent, the nature of the contract may be *prima facie* evidence of its having been made during a lucid interval. (*o*) An action for the price of goods sold and delivered, or of work done, or for the hire of horses, carriages, or servants, cannot be defeated by showing that the defendant had been found by inquisition to be a lunatic at the time he received the goods, or had the benefit of the work, or the use of the horses, carriages, and servants; (*p*) for the law will not permit the lunatic's infirmity to be made an instrument of fraud upon third parties who have dealt with him in good faith. (*q*) If a lunatic, apparently of sound mind and not known to be otherwise, enters into a fair and *bona fide* contract, such contract cannot afterwards be set aside. Therefore where a lunatic purchased of an assurance company two annuities for his life, and paid down the purchase-money, the company having at the time no knowledge of his lunacy, it was held that the contract could not be avoided. (*r*) And where a lunatic contracted for the purchase of an estate and paid down a deposit, and the vendor treated fairly and in good faith, and in ignorance of the infirmity of the lunatic, it was held that the deposit could not be recovered back. (*s*) Although contracts by lunatics cannot be carried into execution against them, yet if they were of sound mind when the contract was made, and the imbecility of intellect has subsequently intervened, the rights of the parties will not be altered. (*t*) The lunacy of a husband is no answer to an action brought against him upon the ordinary implied contract

(*n*) *Yates v. Boen*, 2 Str. 1104; *Thompson v. Leech*, 3 Salk. 301; Vin. Abr. (*Lunatic*); *Beverley's case*, 4 Co. 123 b.

(*o*) *Sergeson v. Sealey*, 2 Atk. 413; *Faulder v. Silk*, 3 Campb. 126; *Creagh v. Blood*, 2 Jones & Lat. 509.

(*p*) *Brown v. Jodrell*, 3 C. & P. 30; *M. & M.* 105; *Niell v. Morley*, 9 Ves. 478; *Dane v. Kirkwall*, 8 C. & P. 679; *Bagster v. Earl of Portsmouth*, 7 D. & R. 614; 5 B. & C. 170.

(*q*) *Nelson v. Duncombe*, 9 Beav. 211; 15 L. J. Ch. 296.

(*r*) *Molton v. Camroux*, 4 Exch. 17; 18 L. J. Ex. 68, 358.

(*s*) *Beavan v. M'Donnell*, 9 Exch. 309; 23 L. J. Ex. 94; *Brice v. Berrington*, 3 Mac. & G. 486.

(*t*) *Ld. Eldon, Owen v. Davies*, 1 Ves. sen. 82; *Hall v. Warren*, 9 Ves. 605.

in respect of necessities furnished to his wife; (*u*) [*150] *for the authority given by law to a destitute wife to pledge the credit of her husband for her support is not revoked by the husband's becoming insane.

Where the husband whilst of sound mind had given the wife authority to deal with the plaintiff, and she, after he had become insane, ordered goods, and the *plaintiff was not aware of the insanity of the husband*, it was held that the husband upon his recovery might be sued for the goods. (*x*) But the authority of a wife to pledge her husband's credit is not greater in the case of a lunatic husband than in the ordinary case of husband and wife; and, therefore, if she has an income adequate to maintain her in her station of life, she cannot pledge the lunatic husband's credit. (*y*) Equity will raise an implied contract, and enforce a demand against the lunatic or his estate for moneys expended for the necessary protection of his person or estate. (*z*)

Contracts with Alien Friends.—Every subject of a friendly state resident in this country has the same power of entering into and enforcing personal contracts as the natural-born subjects of the realm. (*a*) Formerly an alien could not purchase or hold any estate of freehold or inheritance in lands or tenements, because such an interest in the soil was supposed to require a permanent allegiance; and he could not, therefore, lawfully enter into or enforce any contracts connected with the acquisition and enjoyment of freehold estates. (*b*) By the 7 & 8 Vict. c. 66, sect. 4 (repealed by the 33 Vict. c. 14, *infra*), every alien, being the subject of a friendly state, might take and hold every species of personal property whatever, except chattels real, by purchase, gift, representation, or otherwise, as if he were a natural-born subject; and every alien friend residing in this country might, by grant, lease, demise, assignment, or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or occupation, or for the purpose of any business, trade,

(*u*) *Reed v. Legard*, 20 L. J. Ex. 309; 6 Exch. 636; *Davidson v. Wood*, 1 De G. J. & S. 465; 32 L. J. Ch. 400.

(*x*) *Drew v. Nunn*, 4 Q. B. D. 661, C. A.

(*y*) *Richardson v. Du Bois*, L. R. 5 Q. B. 51; 39 L. J. Q. B. 69.

(*z*) *Williams v. Wentworth*, 5 Beav. 325; *Stedman v. Hart*, Kay, 607.

(*a*) Com. Dig. *Alien*, c. 5; *Opheimer v. Levy*, 2 Str. 1082.

(*b*) *Calvin's case*, 7 Co. 23 a; Co. Litt. 2 b; 1 Woodd. lect. *Aliens*; Roll. Abr. 194.

or manufacture, for any term of years not exceeding twenty-one years. (c) And now, by the 33 Vict. c. 14, real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject. But nothing in that act is to qualify an alien to be the owner of a British ship. (d) If after a contract has been made with an alien friend a war breaks out between his country and this, his right of action on the * contract is suspended until the return of peace. (e) [* 151] The crown may indeed, if it thinks fit, lay hands on all his debts and *choses in action*, and prevent him from afterwards putting them in suit; but if it does not think fit so to do, his rights are restored on the return of peace. (f)

Contracts with Alien Enemies.—All alien enemies, and all British subjects and subjects of neutral nations domiciled in any enemy's territory or engaged in the service of a hostile power, (g) are disabled from contracting with British subjects unless they have obtained a license to trade. But they may lawfully provide for the wants and necessities of Englishmen detained abroad, and may enforce contracts made for such purposes on the return of peace. (h) So long as hostilities last they are utterly disabled from suing in our courts of justice, although they may be sued if they reside within their jurisdiction. In one case it was held that a natural-born subject might sue in trust for an alien enemy; (i) but this decision seems to be at variance with numerous authorities. (k) If a subject of a state at war with this country resides here with the license and permission of the crown, he has the same rights and privileges as an alien friend. (l) But the mere fact of the residence of a party

(c) The statute 32 Hen. VIII., c. 16, sect. 13, is virtually repealed.

(d) Sect. 14.

(e) *Flindt v. Waters*, 15 East, 260; Co. Litt. 129, b.; *Boussmaker, ex parte*, 13 Ves. 71.

(f) 1 Rolle, Abr. *Alien*, B. pl. 3; Bro. *Denizen*, pl. 16, 20.

(g) *Roberts v. Hardy*, 3 M. & S. 534; *M'Connell v. Hector*, 3 B. & P. 113; *O'Mealy v. Wilson*, 1 Campb. 482; *The Ocean*, 5 Rob. 90.

(h) *Antoine v. Morshead*, 6 Taunt. 237; *Duhammel v. Pickering*, 2 Stark. 92.

(i) *Daubuz v. Morshead*, 6 Taunt. 332.

(k) *Brandon v. Nesbitt*, 6 T. R. 23; *Bristow v. Towers*, ib. 35; *Brandon v. Curling*, 4 East, 413; *Warin v. Scott*, 4 Taunt. 605; *Albrecht v. Sussman*, 2 Ves. & B. 323; *Willison v. Patteson*, 7 Taunt. 447; *Kensington v. Inglis*, 8 East, 288.

(l) *Wells v. Williams*, 1 Ld. Raym.

in this country without disturbance or interruption is not evidence of a license from the crown, unless it be shown that the government was cognizant of his being here, and sanctioned his stay. (*m*)

Prisoners at War, remaining in the realm under the protection of the crown, may enter into and enforce personal contracts, unless the crown interferes to prevent them. They may sue for the wages of labor, or for the price of goods sold and delivered; and they appear to have the same civil rights and privileges as alien friends. (*n*)

Disabilities of Convicts. — When a person has been convicted of treason or felony, and has been sentenced to death or penal servitude, he is precluded by the 33 & 34 Vict. c. 23, from alienating or charging any property, or making any contract. [**152*] (*o*) *The convict may, however, make contracts when he is lawfully at large under any license, and may sue in respect thereof. (*p*) And his disability ceases altogether when he has suffered his punishment or received a pardon. (*q*)

The administrator of a convict's property, appointed in the manner prescribed by the act, (*r*) may let, mortgage, sell, convey, or transfer any part of such property at his discretion; (*s*) and all such contracts, *bona fide* made by the administrator under the powers of the act, will be binding on the convict, and on all persons claiming an interest in the property by virtue of that act. (*t*)

Disabilities of Outlaws. — When a person has been outlawed he is civilly dead, and is incapable of enforcing any contract he may have entered into, (*u*) although he is liable to be sued thereon. (*x*)

An attainted man, although civilly dead for some purposes, is nevertheless capable of contracting in a foreign country a mar-

282; 1 Salk. 46; *Casseres v. Bell*, 8 T. R. 166; Vin. Abr. *Alien* (1) pl. 8.

(*m*) *Boulton v. Dobree*, 2 Campb. 162; *Alciator v. Smith*, 3 Campb. 244.

(*n*) *Sparenburgh v. Bannatyne*, 1 B. & P. 170; *Maria v. Hall*, 2 B. & P. 236; 1 Taunt. 33, n.

(*o*) Sect. 8. He can pay a debt

claimed by a debtor's summons, and if he fails he will commit an act of bankruptcy. *Ex parte Greaves*, 19 Ch. D. 1.

(*p*) Sect. 30. (*q*) Sect. 7.

(*r*) Sect. 9. (*s*) Sect. 12.

(*t*) Sect. 17.

(*u*) Hawk. P. C. lib. 2, c. 49, sect. 9.

(*x*) *Macdonald v. Ramsey*, Foster, 61.

riage which will be deemed valid in England, if it was valid by the law of that country. (*y*)

The incompetency to contract and sue may be removed by means of a reversal of the outlawry.

Parties privileged from Actions and Suits.—A foreign sovereign cannot be sued in the courts of this country, unless he appears and consents to the action. (*z*) And even then he does not lose his rights as a foreign sovereign; (*a*) and the same privilege was extended to the ambassadors and ministers of foreign reigning sovereigns, their secretaries and domestic servants. (*b*)

Mandamus to Parties to Contracts.—By the Judicature Act, 1873, (*c*) sect. 25 (8), a mandamus may now be granted by an interlocutory order of the court (*d*) in all cases in which it shall appear to be just or convenient that such order should be made, either unconditionally or upon terms. The meaning of this seems to be that the writ will be granted in the class of cases where it would before have issued in the common law courts, but that the courts are to have a wide discretion as to the issue of the writ, * and also to facilitate the proceed- [*153] ing by allowing the writ to issue upon interlocutory applications instead of being claimed by indorsement upon a writ or by pleadings in an action, without, in fact, an action of mandamus. (*e*) It is said by Brett, L. J., that the mandamus here spoken of "is not the prerogative writ, but only a mandamus which may be granted to direct the performance of some act, of something to be done, which is the result of an action where an action will lie:" (*f*) that is to say, that it is in the nature of a mandatory injunction, and not of a writ issuing

(*y*) *Kynnauld v. Leslie*, L. R. 1 C. P. 389; 35 L. J. C. P. 226.

(*z*) *Brunswick (Duke of) v. King of Hanover*, 6 Beav. 1; *Wilson v. Church*, 13 Ch. D. 1; *Twycross v. Dreyfus*, *ante*, p. *71.

(*a*) *Vavasour v. Krupp*, 9 Ch. D. 351.

(*b*) 7 Anne, c. 12. This, however, is not so now, as sects. 1, 2, of the act have been repealed; see Stat. Law Rev. 1867.

(*c*) 36 & 37 Vict. c. 66, sect. 25 (8).

(*d*) A chancery judge may now issue

such a writ in a cause before him. See *Re Paris Skating Rink Co.*, 6 Ch. D. 731. It would seem, however, that the Queen's Bench Division is the proper court to issue such a writ. See *Glossop v. Heston Local Board*, 12 Ch. D. *per* James, L. J. pp. 115, 116, *per* Brett, L. J. p. 122.

(*e*) See Wilson's Judicature Acts, 2d ed. p. 29; but see as to indorsement for injunction, *Colebourne v. Colebourne*, 1 Ch. D. 690.

(*f*) *Glossop v. Heston Local Board*, 12 Ch. D. at p. 122.

where there has been a positive refusal to perform a public duty or negligence amounting to a positive refusal.

Mandamus to Public Companies to make Calls. — Where a public board or corporate body is clothed with certain defined statutory powers, and is authorized to enter into contracts, and has the power of creating, by calls on shareholders, a future corporate property, from time to time, out of the private assets of its individual members, and contracts are made with the corporation on the faith that an honest exercise will be made of these powers, and it is clearly established that the corporation is evading the payment of its just debts and the due satisfaction of a judgment recovered against them, on the ground that they have no corporate assets in hand wherewith to pay, the court will, by mandamus, compel them to exercise the powers vested in them for raising funds, and answer the demands of their creditors. (*g*) But where an action has been brought against a corporation for a debt claimed to be due, and judgment has been recovered, and the plaintiff has the ordinary legal remedy of an execution, the court will not issue a mandamus merely because the execution may produce no fruits. (*h*)

Mandamus to Local Boards, Commissioners, Trustees, and Public Officers to levy Rates and satisfy and discharge a Judgment-debt or a Pecuniary Obligation. ¹ — Whenever judgment has

¹ Mandamus has often been issued from a circuit court of the United States to compel town, county, or city officers created by State laws to perform a duty of levying and collecting a tax, and with the avails discharging a contract of their municipality owned by a citizen of another State. The general foundation of this jurisdiction is that the Constitution (art. 3, sect. 2), extends the Federal judicial power to controversies between citizens of different States, and that acts of Congress have vested this power (when the value in controversy exceeds \$500) in the Circuit Courts (Act of March 3, 1875, 18 Stat. at L. 470; 1 Rev. Stat. Supp. 173), and have empowered them to issue writs of mandamus when necessary to the exercise of their jurisdiction (Rev. Stat. sect. 716). The writ thus used is neither a prerogative writ nor a new suit, but a proceeding ancillary to the judgment of the court upon the contract. The result is that obligations of a municipality owned by a citizen of another State may be sued by him in the U. S. Circuit Court within the State where the debtor corporation exists, and on his recovering judgment and satisfying the court that officers of the municipality are under a legal duty towards him (such a duty as may properly be enforced by mandamus) of

(*g*) *Rex v. S. Cath. Dock Co.*, 4 B. & Ad. 360. See *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642. (*h*) *Reg. v. Victoria Park Co.*, 1 Q. B. 292.

been recovered in an action against the clerk of a local board, or of commissioners or trustees in respect of something done by such commissioners or trustees in execution of statutory powers exempting them from personal liability, the judgment-creditor, when he fails to obtain satisfaction of his judgment-debt from the corporate estate and effects of the board, is in general entitled to a mandamus to compel the board or other public body to levy a rate and discharge the judgment-debt. Wherever

levying and collecting a tax for the payment of the debt he has reduced to judgment, and that compelling them to perform this duty is a necessary means of obtaining satisfaction of the judgment, he may have a mandamus for that purpose. On the general nature, grounds, extent, and limits of the jurisdiction, see 1 Abb. U. S. Prac. 253; *Knox County v. Aspinwall*, 24 How. 376; *Von Hoffman v. Quincy*, 4 Wall. 535; *Galena v. Amy*, 5 Wall. 705; *Walkley v. Muscatine*, 6 Wall. 481; *United States v. Keokuk*, ib. 514; *Bath County v. Amy*, 13 Wall. 244; *Graham v. Norton*, 15 Wall. 427; *Lower v. United States*, 91 U. S. 536; *Board of Liquidation v. McComb*, 92 U. S. 531; *Broughton v. Pensacola*, 93 U. S. 266; *United States v. Clark County*, 96 U. S. 211; *Memphis v. United States*, 97 U. S. 293; *Memphis v. Brown*, ib. 300; *United States v. New Orleans*, 98 U. S. 381; *Lyell v. St. Clair County*, 3 McLean, 580; *Lansing v. County Treasurer*, 1 Dill. 522; 2 Abb. U. S. 53; 9 Am. L. Reg. n. s. 415; *United States v. Sterling*, 13 Int. Rev. Rec. 100; *Britton v. Platte City*, 2 Am. L. J. Rep. 1; *United States v. Supervisors*, 2 Biss. 77; *United States v. New Orleans*, 2 Woods, 230; *United States v. Vernon County*, 3 Woods, 281; *Wisdom v. Memphis*, 8 Cent. L. J. 109; 7 Reporter, 298; *United States v. Jefferson County*, 5 Cent. L. J. 310; 6 Reporter, 486; *Ex parte Parsons*, 1 Hughes, 282; *Jenkins v. Culpeper County*, ib. 568; *Boro v. Phillips County*, 4 Hughes, 216; *United States v. Buckingham County*, 5 Hughes, 285; *United States v. Mobile*, 12 Fed. Reporter, 768. What facts or proofs will warrant the issue of a mandamus in these cases; whether it should be an alternative or a peremptory writ; and what are the grounds of defence on the merits,—see *Supervisors v. United States*, 4 Wall. 435; *United States v. Clark County*, 95 U. S. 769; 96 U. S. 211; *Memphis v. United States*, 97 U. S. 293; *United States v. Fort Scott*, 99 U. S. 152; *United States v. Macon County*, ib. 582; *United States v. Lee County*, 2 Biss. 77; *United States v. Sterling*, ib. 408; *United States v. Badger*, 6 Biss. 308; *Clews v. Lee County*, 2 Woods, 474; *Smith v. Tallapoosa County*, ib. 596; *Blair v. West Point Precinct*, 5 Fed. Reporter, 265; *United States v. Labette County*, 7 Fed. Reporter, 318; *Moran v. Elizabeth*, 9 Fed. Reporter, 72. How the proceedings should be conducted generally, and how obedience may be enforced, see *Benbow v. Iowa City*, 7 Wall. 313; *Mayor v. Lord*, 9 Wall. 409; *United States v. Lee County*, 2 Biss. 77; *Downs v. Rock Island County*, 4 Biss. 508; *United States v. Town Auditors of Brooklyn*, 8 Fed. Reporter, 473; *United States v. Labetter County*, 2 McCrary, 25.

If the owner and holder of the municipal obligation is not a citizen of another State, he cannot ordinarily resort to the Federal courts, but must seek his remedy in the courts of the State in which the municipality is situated. The law and practice of mandamus in the State courts vary somewhat, but are in general modelled on those of England, of the former Court of King's Bench especially. For general accounts, see High, Extraord. Rem. c. 1; and U. S. Dig. tit. *Mandamus*.

[* 154] public officers * have borrowed money upon the security of rates they are authorized to impose, and have not themselves contracted any personal liability to pay, a mandamus will go to compel them to make a rate and repay the money. (*i*) If an act of parliament authorizes parish officers, commissioners of public works, or boards of health to enter into contracts for public works, to employ subordinate salaried officers, and to charge the costs and expenses they incur upon rates they are authorized to impose, and contracts are made by them, and officers appointed, and expenses incurred, and there is no personal liability to pay, and the ordinary remedy by way of action is not available, the court will by mandamus compel them to make a rate, and provide themselves with funds, and pay such expenses. (*k*)

Under sect. 89 of the Local Board of Health Act, 11 & 12 Vict. c. 63, (*l*) a local board of health might be compelled by mandamus to make a rate for the purpose of satisfying a judgment within six months after the judgment had been obtained against them. (*m*) And the remedy is not, generally speaking, available after the six months have expired. (*n*) But a rate may be ordered in aid of a judgment within six months after the judgment was obtained, although the action on which the judgment was obtained was commenced more than six months after the claim accrued, if the delay is excused and shown not to have been undue. (*o*)

Actions in which a Claim for a Mandamus may be sustained.

— Wherever, by charter or act of parliament, a duty is imposed upon a corporate body or chartered company, in the fulfilment of which the plaintiff is interested, and in respect of the non-fulfilment of which the plaintiff is entitled to maintain an action for damages, he may claim a mandamus for the fulfilment of the

(*i*) Reg. v. Brancaster Churchwardens, 7 Ad. & E. 458.

(*k*) Reg. v. Hurstbourne Tarrant, &c., 27 Law J. M. C. 214; Ell. Bl. & Ell. 246; Reg. v. Norfolk Commissioners of Sewers, 20 Law J. Q. B. 121; Bogg v. Pearse, 10 C. B. 542; 20 Law J. C. P. 99.

(*l*) This act is repealed; but there is a similar provision in the Public Health Act, 1875, 38 & 39 Vict. c. 55, sect. 210.

(*m*) Reg. v. Rotherham, 8 Ell. & Bl. 906; 27 Law J. Q. B. 156.

(*n*) Burland v. Kingston-upon-Hull Local Board, 32 Law J. Q. B. 17; in other cases, the plaintiff is not concluded by delay. Ward v. Lowndes, 17 C. B. 940; Reg. v. Churchwardens, &c., 27 Law J. M. C. 215; see Bush v. Martin, 2 H. & C. 311.

(*o*) Worthington v. Hulton, L. R. 1 Q. B. 63; see Ringland v. Lowndes, 33 Law J. C. P. 25.

duty. (*p*) Thus where the plaintiff in an action for a mandamus against a trading company set forth the incorporation of the company by letters patent, directing amongst other things that the capital of the company should be divided into shares, and provision made for the registration of the names of all the proprietors of such shares, and showed that a register of

* shareholders had been established, in conformity with [*155] the provisions of the charter, and that the plaintiff was entitled, as the executor of a deceased shareholder, to have his name inserted in such register, averring that he was personally interested, &c., and had sustained damage, and had made a demand on the company to have his name entered, and that they had refused, &c., it was held on demurrer that the plaintiff was entitled to the writ; for wherever there is a duty in the fulfilment of which the plaintiff is personally interested, and which ought to be fulfilled under royal charter, the non-performance being a grievance to an individual, that is a case for a mandamus. (*q*) It is a case also, as we have seen, where a prerogative writ would be granted independently of the statute. (*r*)

So where the plaintiff, having set forth that the defendants were a joint-stock company duly incorporated under the Joint-Stock Companies Act, and that the plaintiff was duly entered on the register of shareholders as a holder and proprietor of certain shares, numbered, &c., and that the defendants removed his name from the register, and refused, after demand, to restore it, &c., and claimed damages and a mandamus, it was held that the claim was properly made. (*s*)

Where the plaintiff, in his declaration against the clerk of a local board of health, set forth that certain improvement commissioners, appointed under a local act, contracted to pay him a certain sum for certain services towards carrying into effect the purposes of the act; that the services were rendered, but the commissioners neglected to pay; and that afterwards, by virtue

(*p*) See *Morgan v. Metrop. Ry. Co.*, 6 Ell. & Bl. 277. L. R. 3 C. P. 553.

(*q*) *Ld. Campbell, Norris v. Ir. Land Co.*, 8 Ell. & Bl. 512; 27 L. J. Q. B. 116. A company is not bound to register a transfer not in accordance with the statutable form. *Reg. v. Gen. Cem. Co.*, 6 Ell. & Bl. 415; 25 L. J. Q. B. 342;

(*r*) *Norris v. Irish Land Co.*, *supra*; *Rex v. Merchant Taylors' Co.*, 2 B. & Ad. 115.

(*s*) *Swan v. Brit. Austr. Co.*, 7 H. & N. 604; 2 H. & C. 175; *Ward v. South-East. Ry. Co.*, 29 Law J. Q. B. 177.

of another act of parliament, the duties of the commissioners were transferred to the local board of health and it was enacted that all debts payable by the commissioners should be satisfied by the local board out of rates they were authorized to levy; and the declaration went on to show that the debt remained unpaid; that the plaintiff was personally interested in the levying a rate for payment thereof; that he had demanded and been refused payment and a rate, and sustained damage; and he then claimed a mandamus; and the cause went to trial, and the damages were assessed, it was held that the plaintiff was entitled to the mandamus claimed. "The provisions of the Common Law Procedure Act," observes Hill, J.,

"now enable a plaintiff, in an action in which he might [* 156] recover * judgment, but could not have execution, and would have had to apply for a mandamus, to combine a claim for a mandamus with his action, so that if he succeeds, a mandamus issues as part of the judgment. In such a case I think the amount of the debt for which the mandamus is ultimately to issue may be ascertained in the action." (t)

Commissioners, or the members of a local board, appointed annually for executing the powers of a local act of parliament, are generally a fluctuating body in the nature of a corporation, represented by their clerk, who is the party to be sued for services rendered them for purposes within the scope of the act. (u) But for the statute, the commissioners who retain or order the services to be rendered by the plaintiff would be personally liable; but as they are acting for public purposes under statutory authority, with power over a public fund created by the statute, they are generally expressly exempted from personal liability, and the burthen of satisfying and discharging the debts they incur in the execution of the purposes of the act is thrown upon the fund they are authorized to administer. An action to enforce payment of these debts must, as we have seen, be brought against them in the name of their clerk, and when judgment is obtained against the clerk, the public fund or the rates are to be resorted to for its satisfaction, and not the private property of the

(t) *Ward v. Lowndes*, 1 Ell. & Ell. 940; 28 Law J. Q. B. 265; 29 ib. 40.

(u) *Allan v. Hayward*, 7 Q. B. 793; *Bush v. Martin*, 33 Law J. Exch. 17.

commissioners. (x) If, therefore, after judgment has been recovered against the clerk, a demand is made upon the commissioners for satisfaction and discharge of the judgment-debt, and they neglect to provide themselves with funds or to make the payment, an action for damages may be brought upon the judgment, and the claim for a mandamus conjoined therewith, to compel the levying of a rate and the satisfaction and discharge of the judgment-debt. But in these cases the old prerogative writ of mandamus would seem to afford as convenient a remedy for enforcing satisfaction of the judgment-debt (y) as the bringing of a second action for a mandamus. If a second action is brought it must in many cases be commenced within six months of the recovery of the judgment; (z) and it must appear that the judgment has been recovered against the clerk or secretary of the board in respect of some act of proceeding by the members of the board in the *bona fide* execution of the statutory powers entrusted to them, so as to exempt them, and their clerk or secretary, from personal * liability; (a) for if they [* 157] have exceeded the powers conferred upon them, and are not protected from personal liability by the statute, they cannot charge the debts they incur, or the consequences of their unauthorized proceedings, upon the rates, and a mandamus cannot issue to compel them to do what they have no power or authority to do. (b)

Actions in which a Claim for a Mandamus cannot be sustained.

— If in an action for a mandamus nothing more appears upon the record than that the action is brought for the recovery of a debt incurred by the members of some local board, commissioners, or corporate body, and there is nothing to exclude the personal liability of the defendants, and to show that a public duty is sought to be enforced, or that the ordinary remedy by action would not be available, a claim for a mandamus cannot be sustained. (c)

(x) *Hall v. Taylor*, Ell. Bl. & Ell. 107; 27 Law J. Q. B. 311; *Kendal v. King*, 17 C. B. 483. See Addison on Torts (5th ed., by Cave), pp. 671, 672.

(y) *Ante*, pp. * 152, * 153.

(z) *Burland v. Kingston, &c.*, Local Board, *ante*, p. * 54.

(a) *Southampton, &c. Bridge Co. v.* Southampton Local Board, 8 Ell. & Bl. 801; 28 L. J. Q. B. 41.

(b) *Duncan v. Findlater*, 6 Cl. & F. 908; *Bush v. Beavan*, 32 Law J. Exch. 58.

(c) *Benson v. Paull*, 6 E. & B. 273; *Norris v. Irish Land Co.*, 8 E. & B. 512; *Bush v. Beavan*, *supra*.

Where the performance of the duty is impossible by reason of insufficient funds, the court will not issue a writ. (*d*)

Declaration in an Action for a Mandamus. — When the mandamus is claimed for the satisfaction and discharge of a pecuniary demand, it must be shown, as we have seen, that it does not constitute a mere private debt, in respect of which the ordinary action of debt would be an available remedy, but that the only mode of obtaining payment is by recourse to a rate, the duty of making and levying which is, by statute or royal charter, imposed upon the defendants. The declaration need not state the precise amount due, as in the case of the prerogative writ of mandamus to enforce a judgment obtained against an officer of a corporation; but the plaintiff is at liberty to allege the existence of the debt generally, leaving it to the jury to find the precise amount for which the mandamus claimed is to issue, and when that amount is found by them, the mandamus forms part of the judgment in the action. (*e*)

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SECTION III.

ON THE AUTHENTICATION OF CONTRACTS.

Of the Legal Authentication of Contracts.¹ — In most countries, and under most systems of jurisprudence, certain forms and

¹ Besides the statutes of frauds, there are statutes and rules of court requiring particular species of contracts to be in writing: such as contracts on which a mechanic's lien is claimed; shipping-articles of seamen; insurance policies; stipulations affecting progress of a suit, &c. Rules of this character are mentioned in treating the several contracts to which they respectively relate. Mention may here be made of principles applicable where contracting parties, independently of requirements of the statute of frauds, voluntarily reduce their contracts to writing. The statute requires a memorandum in specified cases; in others the parties are free to contract either in writing or by parol, as they may prefer; but if they

60. Some of the passages in the judgment in this case do not appear to be reconcilable with the judgment of the Court of Queen's Bench, in narrowing the operation of sects. 69, 70, and 71 of the Common Law Procedure Act, 17 &

18 Vict. c. 125; *Ward v. Lowndes*, 1 Ell. & Ell. 940; 28 Law J. Q. B. 265.

(*d*) *Re the Bristol Ry. Co.*, 3 Q. B. D. 10.

(*e*) *Ward v. Lowndes*, 1 Ell. & Ell. 940; see C. L. P. Act, 1854, sect. 69.

solemnities have been established for the purpose of binding men finally and conclusively to the truth and good faith of their acts

choose the former mode, the written evidence which they sign becomes the best evidence of their intentions, is superior to contradiction by parol evidence, and is interpreted and enforced very much as are the agreements which the statute requires. The rules are chiefly treated under the heads of the various particular contracts, but there are some which are of general application.

A contract cannot rest partly in parol and partly in writing; nor can verbal conditions be annexed to a written contract. *Black v. Bowman*, 9 Ark. 501; *Quartermous v. Kennedy*, 29 Ark. 544; *Waggeman v. Bracken*, 52 Ill. 468; *McClure v. Jeffrey*, 8 Ind. 79; *Woodall v. Greater*, 51 Ind. 539; *Van Ostrand v. Reed*, 1 Wend. 424; *Vandervoort v. Smith*, 2 Cai. 155; *Mumford v. McPherson*, 1 Johns. 414. A writing resting partly in writing, partly in parol, is treated as an oral contract. *Marion County v. Shipley*, 77 Ind. 553.

There seems to be some conflict of decision on the question whether, when parties have attempted to put their agreement in writing, but the writing is inoperative because incomplete or informal, — because not signed, stamped, delivered, or for similar reasons affecting only the instrument, not the substance of the actual agreement, — the paper supersedes the oral negotiations, and precludes either party from proving a valid contract by parol, or is inoperative altogether, leaving either party at liberty to prove and recover on an oral agreement if a valid one was in fact made. For cases taking the first-mentioned view, see *Davy v. Morgan*, 56 Barb. 218; *Dutch v. Mead*, 36 N. Y. Superior Ct. 427; *Newby v. Rodgers*, 40 Ind. 9. For cases taking the second view, viz., that the attempt to reduce the agreement to writing does not nullify the oral engagement unless sufficiently completed to bind the parties by the written one, see *Blight v. Ashley*, Pet, C. Ct. 15; *Moulding v. Prussing*, 70 Ill. 151; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Peck v. Miller*, 39 Mich. 594; *Shepard v. Haas*, 14 Kan. 443; *Courtenay v. Fuller*, 65 Me. 166; *Healy v. Young*, 21 Minn. 389; *Gage v. Jaqueth*, 1 Lans. 207; *Mildren v. Pennsylvania Steel Co.*, 90 Pa. St. 317; *Ruckman's Appeal*, 61 Pa. St. 251; *Syndics v. Woods*, 5 La. Ann. 135; *Fish v. Johnson*, 16 La. Ann. 29; *Montague v. Weil*, 30 La. Ann. pt. 1, 50; *Fredericks v. Fasnacht*, ib. 117; *Avandano v. Arthur*, ib. 316; *Villere v. Brognier*, 3 Mart. (La.) 326; *Waggeman v. Bracken*, 52 Ill. 468; *Bourne v. Shapleigh*, 9 Mo. App. 64; *Methudy v. Ross*, 10 Mo. App. 101.

As to sufficiency of a written agreement aside from statutory requirements; as to certainty or ambiguity, description of subject-matter, mode of stating the engagements of parties, and other points connected with form and expression, — see *Shepard v. Haas*, 14 Kans. 443; *Segars v. Segars*, 71 Me. 530; *Quincy Bank v. Hall*, 101 U. S. 43; *Quick v. Wheeler*, 78 N. Y. 300; *Smith v. Weaver*, 90 Ill. 392; *Weiden v. Woodruff*, 38 Mich. 130; *Jackson School Township v. Farlow*, 75 Ind. 118. Sufficiency of statements of terms in an exchange of telegrams, to constitute a valid contract, see *Deshon v. Fosdick*, 1 Woods, 286; *Wells v. Milwaukee, &c. Ry. Co.*, 30 Wis. 605; *Duble v. Batts*, 38 Tex. 312; *Schonberg v. Cheney*, 6 Thomp. & C. 200, 3 Hun, 677. Except when required by some positive law, the consideration for a contract need not appear upon its face, but may be proved by parol or inferred from the terms and obvious import of the agreement. *Attix v. Pelan*, 5 Iowa, 336; *Tingley v. Cutler*, 7 Conn. 291; *Monton v. Noble*, 1 La. Ann. 192; *Cummings v. Dennett*, 26 Me. 397; *Patchin v. Swift*, 21 Vt. 292; *Thompson v. Blanchard*, 3 N. Y. 335; *Bartlett v. Matson*, 1 Mo. App. 151. If not expressed in the writing, a consideration may be

and representations, and for the due authentication of contracts. The highest and most authentic contract known to the civil law

proved *aliunde*. *Arms v. Ashley*, 4 Pick. 71. But if one is expressed in the writing, no other can be proved (*Schermerhorn v. Vanderheyden*, 1 Johns. 139; *Veacock v. McCall*, Gilp. 329; *Emery v. Chase*, 5 Me. 232), unless the words "for other considerations" are used (*Maigley v. Hauer*, 7 Johns. 341; *Cutter v. Reynolds*, 8 B. Mon. 596). Duplicates, &c., *Totten v. Bucy*, 57 Md. 446.

Necessity and sufficiency of the signatures of the parties : see *Staples v. Wheeler*, 38 Mich. 372; *Esmay v. Gorton*, 18 Ill. 483; *Fish v. Levine*, 16 La. Ann. 29; *Marshall v. Hann*, 17 N. J. L. 425; *Dutch v. Mead*, 36 N. Y. Superior Ct. 427; *Van Nostrand v. New York Guaranty, &c. Co.*, 39 N. Y. Superior Ct. 73; *Steininger v. Hoch*, 39 Pa. St. 263; *Grove v. Hodges*, 55 ib. 504; *State v. Jones*, 1 McMull. 236; *Stearns v. Haven*, 16 Vt. 87; *Paige v. Fullerton Woollen Co.*, 27 Vt. 485; *Brandon Manuf. Co. v. Morse*, 48 Vt. 322. When and how a contract in writing may be executed by mark instead of by signing the name, see *Selden v. Myers*, 20 How. 506; *Traumbly v. Ricard*, 130 Mass. 259; *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. L. 193; *Zimmerman v. Sale*, 3 Rich. 76. The necessity, sufficiency, and effect of delivery and acceptance of written agreements, see *Blanchard v. Blackstone*, 102 Mass. 343; *Newby v. Rodgers*, 40 Ind. 9. Simple written contracts may be delivered subject to conditions; and in case of such a delivery, performance of the condition is essential to the validity of the instrument. The annexing of the condition to the delivery is not an oral contradiction of the written obligation, but as there needs to be a delivery in order that the instrument should become operative at all, the effect of the delivery and the extent of the instrument's operation may be limited by imposing the condition. *Benton v. Martin*, 52 N. Y. 570.

Rules of presumption and burden of proof applying to simple written contracts generally independent of the statute of frauds are, that unless a contract sued upon appears to have been in writing, it will be regarded as unwritten (*Lamb v. Donovan*, 19 Ind. 40); that the execution of a contract is *prima facie* evidence of authority to contract (*Shelbyville v. Shelbyville*, 1 Met. (Ky.) 54), though where the names of parties to a contract have been signed by a person representing himself to another party as their agent, and the parties whose names have been thus signed especially deny the authority in a suit to enforce it, the burden of showing authority in the agent to sign the names of the principals, or a subsequent ratification by them, falls on the party who seeks to enforce the contract (*McCarty v. Straus*, 21 La. Ann. 592); that it is for the plaintiff to establish an alleged agreement where the defendant denies that any was made (*Burton v. Mason*, 26 Iowa, 392); or to show that it was absolute if the evidence raises a question whether it was not conditional (*Hebbard v. Haughian*, 70 N. Y. 54); that in construing the terms of a contract the presumption is in favor of the comprehensive over the restricted, and the common over the unusual, sense of the words (2 Pars. Contr. 500; *Metcalf v. Taylor*, 36 Me. 28); that the destruction of a contract creates a presumption against the party destroying it (*Warren v. Crew*, 22 Iowa, 315; *Jones v. Knauss*, 31 N. J. Eq. 609); but not one overriding affirmative proof of its contents (*Bott v. Wood*, 56 Miss. 136); that the parties to a simple contract intend to bind not only themselves, but their personal representatives (2 Pars. Contr. 533); that where the instrument is not of itself necessarily illegal and void, it will be presumed to be valid (*Brown v. Brown*, 34 Barb. 533); the burden of showing it invalid rests on him who impeaches it (*Alabama, &c. Life Ins. Co. v. Central Agricultural, &c. Assoc.*, 54 Ala. 73); and so of the burden of proving that it was

was called a *STIPULATION*; it was entered into before a magistrate or public officer, through the medium of interrogatories and answers calculated to explain the nature and extent of the undertaking, to put the parties entering into it on their guard, and to show it to be their mature and deliberate act. (a) A

made under mistake of fact (*Dodd v. Gloucester Ins. Co.*, 127 Mass. 151); or that by mistake it was not made to express all the terms of the actual agreement (*Robbins v. Magee*, 76 Ind. 381). In an action on an affirmative contract, as to pay money or perform some duty, if the plaintiff proves the contract, he is not bound to give evidence of non-performance; it is then incumbent on the defendant to prove payment or performance, or its equivalent (*McGregory v. Prescott*, 5 Cush. 67). And where the terms of a contract call for work to be performed, a presumption is indulged in favor of faithful performance (*Roberts v. Brownrigg*, 9 Ala. 106); and that compensation was intended (*Doggett v. Ream*, 5 Ill. App. 174). And where A contracted to locate land and procure a patent, and proved that he caused a patent to be issued, and paid the dues and fees, it was held that the jury might presume he procured the location and survey to be made. *Emmons v. Oldham*, 12 Tex. 18. Where anything is to be done, as goods to be delivered, and no time is specified, the presumption is that performance within a reasonable time was intended (*Sawyer v. Hamatt*, 15 Me. 40; *Howe v. Huntington*, ib. 350; *Atkinson v. Brown*, 20 Me. 67); and that if an agreement is silent as to the place of performance, that performance where it was made was intended (*De Sobry v. De Laistre*, 2 Har. & J. 191); that in a contract for the sale of goods, the delivery and payment are to be concurrent acts (*Tipton v. Feitner*, 20 N. Y. 423); that where an obligation is undertaken by two or more, or a right given to two or more, it is a just obligation or right (1 Pars. Contr. 11; *Yorks v. Peck*, 14 Barb. 644); that the evident alteration of any instrument was made after its execution (2 Pars. Contr. 721). A contract, good according to the law either of the place of contract or of performance, will be presumed to have been made in view of the law of that place where it would be good, and is therefore valid. *Brown v. Free-land*, 34 Miss. 181. There is no presumption in aid of a written contract which appears to have been executed on Sunday that the parties were observers of Saturday as their Sabbath, and therefore at liberty to contract on Sunday (*Sayre v. Wheeler*, 31 Iowa, 112); where a contract, valid on its face, is sought to be impeached, as in contravention of the stock-jobbing act, the *onus probandi* is on the impeaching party (*Dykens v. Townsend*, 24 N. Y. 57). The law will not presume a promise to pay for board or services as among members of the same family and persons more or less intimately or remotely related, where they are living together as one household (*Wilcox v. Wilcox*, 48 Barb. 327; *King v. Kelly*, 28 Ind. 89); nor is a person entering into a contract bound by the usage of a particular business, unless it is so general as to furnish a presumption of knowledge (*Stevens v. Reeves*, 9 Pick. 197).

(a) "Nimirum leges Romanæ ex nudâ conventionem neminem obligari voluerunt, ne quaecunque promissum, et sermo, sæpe inconsultus magis quam ex voluntate proficiscens, necessitate juris promittentem illigaret, et litium quoque, ut opinor, præcidendarum causâ; sed excogitata est conventio

certo modo et formâ concipiendâ celebrandaque, quam deliberati animi certum signum esse voluerunt, et ex quâ certo jure actio competeret, quam conventionem *STIPULATIONEM* dixerunt." — VINNIUS, lib. 3, tit. 16, p. 677; "*STIPULATIONIS* introducendæ ratio hæc una fuit, ut discerni posset, an

solemn contract of this nature could not afterwards be impeached, except on the ground of fraud or deceit, and could not by the civil law be released or discharged whilst executory, except by an equally solemn proceeding, conducted by question and answer before the magistrate or public functionary, called an

ACCEPTILATION. (b) The civil law did not consider the [* 159] circumstance of the contract or undertaking being * put into writing equivalent to the *verba solennia* or stipulation. The written promise, or acknowledgment, or note, amounted only to evidence of the fact or transaction, and might be avoided and rendered nugatory by extrinsic testimony; but if the acknowledgment was made in the prescribed form before the public functionaries, it was at once conclusive, and no exception could afterwards be brought against it. By the intervention of a stipulation, the written contract at once ceased, the lesser security being merged in the greater. (c) The Continental nations, acting by analogy to the civil law, recognize in general two classes of contracts of a superior and inferior nature, the one being public authentic acts ratified and confirmed before witnesses, or in the presence of a magistrate, or a notary public, or a registrar or judge; the others, private acts, which are entered into and arranged between the parties themselves, without witnesses, and without the ministry or authentication of any public officer. The publicly authenticated contract carries with it full credit; but the private act may be questioned and contradicted, and requires some cause or consideration for its compulsory fulfilment. (d)

Contracts requiring Authentication by a Signed Writing.¹—

¹ The English statute of frauds, 29 Car. II. c. 3, may be found transcribed in Browne, Stat. Fr., App. 581, or Throop, Verb. Agr. 21; followed by some later English enactments of analogous character. The American statutes as they existed at about 1870 are given in Throop, Verb. Agr. 36-65; the same as existing at about 1880 are given in Browne, Stat. Fr. (4th ed. 1880) 585, 633. The

promissio temere effusa an vero consulto concepta esset." — PEREZII prælect. 2, p. 71.

(b) Vin. p. 677; Dig. lib. 45, tit. 1; Cod. lib. 8, tit. 38, 44; Dig. lib. 46, tit. 4; Inst. lib. 3, tit. 30; Pandect. lib. 50, tit. 17, art. 5, par Pothier, vol. 5, p. 254.

(c) Vinnius, pp. 735, 736, 738; Perez. prælect. lib. 4, tit. 30; Cod. lib. 14, tit. 30, sect. 14, ed. Gothofred, p. 238.

(d) "L'obligation *sans cause* ne peut avoir *aucun effet*." — Code Civile, liv. 3, tit. 3, sect. 4.

Contracts for the Sale of Interests in Land.² — By the 29 Car. II. c. 3, sect. 4, no action shall be brought whereby to charge any

treatises of Browne and Throop each aim at a comprehensive treatment of the operation of the statutes, giving primarily the American law, together with mention of whatever English decisions are deemed useful in this country. But while Mr. Browne's treatise is completed according to this plan (it reached the 4th edition in 1880), one volume only of the two which Mr. Throop contemplated has been published. It embraces the requirements and effect of the statute upon special promises of executors and administrators, &c.; special promises to answer for the debt, default, or miscarriage of another person; and agreements made upon consideration of a marriage, — other heads being postponed to the proposed second volume. For other general accounts, see 3 Pars. Contr. (6th ed. 1873) 3–60; 2 Story, Contr. (5th ed. 1874) 627. A series of articles by H. Reed, entitled *Studies in the Law of the Statute of Frauds*, 13 Am. L. Reg. n. s. 593; ib. 721; 15 Am. L. Reg. n. s. 321, give a useful general view, specially discussing the Pennsylvania statute, and announcing a volume of leading cases on the statute, by the same author, 16 Am. L. Reg. n. s. 577.

For the decisions on the application of the respective provisions of the various American statutes to contracts generally, see U. S. Dig. tit. *Contracts*, sect. 560; what contracts are within the statute, sect. 575; what is a sufficient memorandum or signing, sects. 607–665; what is not, sects. 666–696; contracts not to be performed within a year, sects. 697–746; what contracts are excepted on the ground of performance, sect. 747; or of part performance, sects. 761–783. Application of the statutes to conveyances in fraud of creditors, see ib. tit. *Fraudulent Conveyances*, sect. 220; to engagements to answer for the debt of another, ib. tit. *Guaranty*, sect. 50; to leases, ib. tit. *Landlord and Tenant*, sect. 658; to marriage settlements, ib. tit. *Husband and Wife*, sect. 330; to sales of chattels, ib. tit. *Sales*, sects. 80, 99; of land, ib. tit. *Specific Performance*, sects. 409, 437, 449; ib. tit. *Vendor and Purchaser*, sect. 136; to sales by auction, ib. tit. *Auction*, sect. 36; or upon execution, ib. tit. *Execution*, sect. 1619. Noteworthy discussions of the effect of any single portion of the statute are mentioned under the appropriate caption in the text, pp. *159–*180.

Recent cases on the general operation of the statute are : The statute of frauds does not forbid setting up an oral agreement for an interest in lands as a defence.

² On the formalities for conveying estates in land, see Browne, Stat. Fr. (4th ed. 1880) c. 1; leases covered by the statute, ib. c. 2; leases excepted from the statute, ib. c. 3; assignment and surrender, ib. c. 4; conveyances by operation of law, &c., ib. c. 5; trusts implied by law, ib. c. 6; express trusts, ib. c. 7; contracts for land, ib. c. 12; verbal contracts enforced in equity, ib. c. 19. See further, 3 Pars. Contr. (6th ed. 1873) 31–35; 2 Story, Contr. (5th ed. 1874) sects. 1439–1441; 2 Washb. R. P. (4th ed. 1876) 49, 84, 501; 3 Washb. R. P. (4th ed. 1876) 234, 340.

What parol leases are valid, see U. S. Dig. tit. *Landlord and Tenant*, sect. 658; what are not, ib. sect. 678; execution and delivery of written leases, ib. sect. 692; their form and sufficiency generally, ib. sect. 715; and see further, Taylor, Land. and Ten., sects. 28–32; 1 Washb. R. P. (4th ed. 1876) 614.

Validity of sales by parol, under the statute of frauds, see U. S. Dig. tit. *Vendor and Purchaser*, sect. 136; what estates or interests in land are within the statute, sect. 166; what are not, sect. 206; what agreements respecting lands are within the statute, sect. 24; what are not, sect. 299; contracts (for lands) not to be performed

person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the

Thus a plea to a promissory note, that the maker paid it by delivering possession of lands, which payee accepted in full satisfaction, is not bad. *Thayer v. McEwen*, 4 Ill. App. 416.

One who has surrendered a contract entitling him to buy lands, in order that they may be conveyed to another purchaser, is not prevented by the statute of frauds from suing for the consideration orally promised him for making the surrender. *Sullivan v. Dunham*, 42 Mich. 518.

Strangers to a contract cannot impeach it by setting up the statute of frauds. *Lavender v. Hall*, 60 Ala. 214; *Rickards v. Cunningham*, 10 Neb. 417.

A third person cannot set up the statute to defeat a parol agreement to rescind a deed; only the party to be charged by the contract can object. *Davis v. Inscocoe*, 84 N. C. 396.

When the parties to contracts within the statute of frauds and the statutes concerning trusts and powers have voluntarily and fully executed their agreements, so far as real estate or any interest or trust therein is affected, there is no reason why the statutes should be interposed against the further enforcement of the contracts according to their terms. *Tinkler v. Swaynie*, 71 Ind. 562.

The doctrine of part performance taking a contract out of the statute is a creature of equity, and is applied only for protecting titles to lands. It does not sustain an action brought to recover money on an oral contract which, by the statute, should have been in writing. *McElroy v. Ludlum*, 32 N. J. Eq. 828.

In order to the enforcement of a contract within the statute of frauds on the ground of part performance, a certain and definite parol agreement must be proved, and the acts relied upon in proof of part performance must refer to, result from, or be made in pursuance of, the agreement; which must have been so far executed that a refusal to fully execute it would operate as a fraud upon the other party, and place him in a position for which no compensation could be had at law. *Brown v. Brown*, 33 N. J. Eq. 650.

within a year, sect. 356; form and sufficiency of the memorandum, sect. 362; how and by whom the memorandum must be executed, sect. 382; effect of performance in whole or in part, sect. 395; effect of payment of purchase-money, sect. 407; of taking and continuing possession, making improvements, &c., sect. 415.

Recent cases are: An oral agreement to return leased premises in the same condition as when they were hired, is good. *Halbut v. Forrest City*, 34 Ark. 246.

An oral lease or agreement for a lease for a year to commence from a future day, is valid within the statutes of Colorado (*Sears v. Smith*, 3 Col. T. 287), and Iowa (*Jones v. Marcy*, 49 Iowa, 188), but must be in writing in Kansas, (*Wolf v. Doyer*, 22 Kan. 436).

A letting for a term of five years was held invalid, notwithstanding tenant had been put in possession under it, and had occupied and paid rent for two years. *Creighton v. Sanders*, 89 Ill. 543.

A simple permission to occupy land, rent free, may operate as a valid license without being in writing. *Bailey v. Ward*, 32 La. Ann. 839.

As to an agreement for a renewal of a lease at a rental to be a percentage on value of the land as fixed by appraisers, see *Norton v. Gale*, 95 Ill. 533.

An agreement to convey land need not be in writing in order to be enforced after the conveyance has been made. *Tuthill v. Roberts*, 22 Hun, 304; *Reyman v. Mosher*, 71 Ind. 596.

The fact that a lease is for a longer term than three years does not prevent a

agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by

rescission thereof by a parol agreement of the parties, when accompanied by a surrender of the lease and possession by the tenant to the landlord, and acceptance by the latter. It is not like a sale and transfer to a stranger of an interest in land greater than a term of three years, and is not, therefore, within the statute of frauds. *Auer v. Penn*, 92 Pa. St. 444.

A parol agreement for sale of a growing tree passes no title, for the tree is part of the land; the agreement has only the force of a license to enter and cut. *Armstrong v. Lawson*, 73 Ind. 498.

An oral sale of land was accompanied by a stipulation, also oral, that the growing crop should pass with the land. *Held*, that although an independent sale of growing crops might be sustainable, though not in writing, an agreement merely collateral, to avoid sale of the land, could not be. *Jackson v. Evans*, 44 Mich. 510.

Whether an agreement for farming land on shares must be in writing, decided, in cases involving part performance. *Treadway v. Smith*, 56 Ala. 345; *Wiley v. Bradley*, 60 Ind. 62.

Whether an agreement between a parent and a child that if the child will support the parent, the parent will convey land to the child, is within the statute, see *Mauck v. Melton*, 64 Ind. 414; *Johns v. Johns*, 67 Ind. 440; *McCormick v. Drummett*, 9 Neb. 384.

A parol purchase of the share of one tenant in common in land cannot be made valid by payment, or by taking possession under deeds conveying the shares of the other tenants and improving the land. *Nay v. Mograin*, 24 Kan. 75.

A parol agreement to construct a ditch and keep it in repair for the mutual benefit of several parties will be enforced in equity if, in pursuance thereof, they have performed labor, and paid their share of the expenses. *Goch v. Sullivan*, 13 Nev. 78.

A devise of rents from the testator's real estate which the executors were directed to sell, is an interest in lands within the statute. *Brown v. Brown*, 33 N. J. Eq. 650.

The statute does not require that a judgment constituting a lien on land should be assigned by a written instrument. *Winberry v. Koonce*, 83 N. C. 351.

The statute does not prevent a parol declaration of trust in lands, and such trust may be defeated or rebutted by parol. *Wiser v. Allen*, 92 Pa. St. 317.

The following parol agreements for various interests in lands have been sustained notwithstanding the objection that they ought, by the statute of frauds, to have been in writing. A promise to pay a bonus or premium for being substituted in promisee's place as purchaser in a contract for sale of land, where promisor had received conveyance of the lands as agreed. *McCarthy v. Pope*, 52 Cal. 561. An agreement to pay an agent for services in negotiating a sale of land. *Watson v. Brightwell*, 60 Ga. 212. A grantee's agreement to pay to grantor a sum additional to the price paid on conveying if grantor should, within a specified term, find a purchaser for the land at an advance. *Reyman v. Mosher*, 71 Ind. 596. A contract by which one was to make brick on the land of another, the latter to be owner of the brick until paid for his materials. *Brown v. Morris*, 83 N. C. 251. An agreement between two persons interested in a railroad and desiring to bid at a foreclosure sale, that one should not bid, that the other should bid for benefit of both, and that a new company should be organized in which both should share. *Cornell v. Utica, &c. R. R. Co.*, 61 How. Pr. 184. An agreement for exchange of land where one party gave his cheque for difference in value, and

the party to be charged therewith, or some other person thereunto (e) by him lawfully authorized. This refers to agreements

the receipt given specified the lands and prices, but omitted to mention the terms to run of certain mortgages. *Raubitsche v. Blank*, 80 N. Y. 478. A husband's promise to convey land to his wife, in consideration of her relinquishing her inchoate dower in other lands of his. *Brown v. Rawlings*, 72 Ind. 505. An agreement by a husband and wife for value received, to relinquish real property (not a homestead). *Hotchkiss v. Cox*, 47 Iowa, 655. A promise by a school board occupying a lot, to the land owner, that on his paying them a certain sum they would surrender the lot and build elsewhere. *Wilkins School Dist. v. Milligan*, 88 Pa. St. 96. A conveyance obtained from the State by an attorney for the avowed purpose of protecting a client's interest in the land against tax titles; and therefore subject to a resulting trust. *Cameron v. Lewis*, 56 Miss. 76. A promise of a municipal corporation to compensate a lot owner for injury to his lands by a street opening illegally conducted. *Coleman v. Chester*, 14 S. C. 286.

The following agreements for various interests in lands have been held insufficient under the statute for want of a proper memorandum. An agreement whereby one party was to expend money in purchasing an interest in land for the other. *Wetmore v. Newberger*, 44 Mich. 362. An agreement between two brothers to unite their funds, buy land, and build a double house, each to take one part. *Overmeyer v. Koerner*, 81 Pa. St. 517. A promise to give a note for the price of land to be conveyed to a third person, although the conveyance had been made as agreed. *Liddle v. Needham*, 39 Mich. 147. An agreement to pay for work by giving a conveyance of land. *Sutton v. Rowley*, 44 Mich. 112. An agreement that labor of A in farming land of B should entitle A after a certain time to an equal share in the land. *Neal v. Neal*, 69 Ind. 419. A promise to convey land in payment for a monument to be constructed by the promisee for the promisor, where the promisor had refused the monument and had not benefited by the promisee's labor in making it. *Dowling v. McKennedy*, 124 Mass. 478. A husband's promise to complete execution of a deed which his wife, in his absence, but with his consent, had made and delivered, leaving a blank for his signature, although grantee had been put in possession. *Curtis v. Abbe*, 39 Mich. 441. A promise by a purchaser of lands at a foreclosure sale that when he has been reimbursed for his expenditure he will reconvey to the mortgagor. *Howland v. Blake*, 97 U. S. 624. Agreements with a debtor to buy his land offered for sale on foreclosure or on execution and to convey it to him. *Carlisle v. Brennan*, 67 Ind. 12; *Harrison v. Nailey*, 14 S. C. 334; see also *Pucker v. Steelman*, 73 Ind. 396. An engagement to procure from a third person a conveyance of an equity of redemption owned by him. *Rawdon v. Dodge*, 40 Mich. 697. A promise by the holder of a mortgage on lands to release a portion on receiving a proportional payment of the debt. *Merrill v. Pease*, 51 Vt. 556.

A memorandum of a sale of lands (in New Hampshire) must contain enough to identify parties, land, and price, without resort to parol evidence. *Grafton v. Cummings*, 99 U. S. 100; s. p. *Fulton v. Robinson*, 55 Tex. 401.

A memorandum which designates the land vaguely as "a tract of three acres situate in" a township named, may be aided by evidence that the purchaser has taken possession of a particular tract as being the one intended. *Troup v. Troup*, 87 Pa. St. 149.

A title bond for "a steam-mill and distillery" in a specified district, county,

(e) The agent must be authorized to the person interested. *Smith v. Webster*, sign the contract, and sign it as binding 3 Ch. D. 49.

not operating as an immediate transfer or conveyance of an estate or interest in land, but as contracts to make or execute a grant, or transfer, or conveyance, at some subsequent period. (*f*) Agreements for leases and for the sale, assignment, or surrender of leasehold estates, being contracts for a grant or transfer of an estate or interest in land, are within this clause of the statute, and must consequently be authenticated by a signed writing. (*g*) Where anything is to be done which substantially amounts to a sale or parting with an interest in land, the contract is within the statute. (*h*) A grant of a right to shoot and take away game was held within the statute. (*hh*) Where it was agreed that plaintiff should surrender her tenancy and prevail * on her landlord to accept defendant as tenant in her [*160] place, and that defendant should then pay her for so doing £100, it was held that the contract amounted to a sale of an interest in land within the statute. (*i*) And generally, whenever

and State, was held sufficient; parol evidence is receivable to identify the property. *White v. Motley*, 4 Baxter, 544. So parol evidence is admissible under a memorandum calling for "half of town lot No.," &c., that the east half was vacant. *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq. 193.

Memoranda held insufficient for want of a proper description of the premises which named them only as a "town lot;" the "lot adjoining." *Johnson v. Granger*, 51 Tex. 42; *Scarritt v. St. John's Meth. Ep. Church*, 7 Mo. App. 174.

Occupancy and payment of rent under a parol lease for a part of the term are not a part performance which takes the lease out of the statute. *Creighton v. Sanders*, 89 Ill. 543.

Whether taking possession (and making improvements) under an oral agreement of letting takes it out of the statute, see *Switzer v. Gardner*, 41 Mich. 164; *Whiting v. Pittsburgh Opera House Co.*, 88 Pa. St. 100; *Padfield v. Padfield*, 92 Ill. 198.

Contracts for sale of mere improvements not within the statute. Note to *Peronette v. Pryme*, 34 N. J. Eq. 26.

A parol contract to convey lands is not taken out of the statute of frauds by the mere payment of purchase-money. *Suman v. Springate*, 67 Ind. 115.

Possession of one who occupies for the purpose of farming the land is not such a taking possession as will supply the place of a memorandum of an agreement that his labor for a specified term shall entitle him to a share of the land. *Neal v. Neal*, 69 Ind. 419; compare *Johns v. Johns*, 67 Ind. 440.

Possession, to take a parol contract out of the statute, must be visible, notorious, and exclusive. *Brown v. Lord*, 7 Ore. 302.

(*f*) *Sugd. Vend.* 94, n.

(*hh*) *Webber v. Lee*, 9 Q. B. D. 315.

(*g*) *Anon.*, *Ventr.* 361; *Poulteney v. Holmes*, Str. 405.

(*i*) *Cocking v. Ward*, 1 C. B. 868; 15 L. J. C. P. 245. But see *Angell v. Duke*,

(*h*) *Kelly v. Webster*, 12 C. B. 290; *L. R.* 10 Q. B. 174; *Pulbrook v. Lawes*, *Willes, J.*, *Smart v. Jones*, 15 C. B. 1 Q. B. D. 284.
N. S. 717; 33 L. J. C. P. 156.

the contract or promise sued upon forms part of one entire contract for an interest in land, it will fail to support an action if it is not authenticated by writing, (*k*) unless there has been a part performance of the agreement, in which case it may generally be enforced; (*l*) for the courts will not allow the statute of frauds to cover a clearly fraudulent act. (*m*) In order to constitute a part performance, the parties must have put themselves in a different position from that in which they would have been had there been no contract; as, for instance, when possession is accepted, (*n*) or when a tenant expends money upon a farm, (*o*) or pays an increased rent. (*p*) And where it is evident that the parties have been pursuing a course of acting as if there were a contract, the court will enforce such contract. (*q*) Where a father verbally promised his daughter a house as a wedding present, and put her in possession, and he paid instalments to a building society in respect of it, and at his death there was still £110 due to the society, it was held that the possession took the case out of the statute, and that the £110 must come out of the father's estate. (*r*) The mere payment of purchase-money is not a part performance. (*s*) Where the defendant served as housekeeper to the intestate, who had made but not attested a will in which he left defendant a life estate in a farm, it was held there was no part performance sufficient to exclude the statute. (*t*) The above doctrine only applies to contracts in respect of land, or at all events does not apply to contracts of service. (*u*)

Interests in Land. — Contracts for the Letting and Hiring of Furnished Houses and Lodgings by the day, week, or month are

(*k*) *Hodgson v. Johnson*, E. B. & E. 689; 28 L. J. Q. B. 88. But see *Pulbrook v. Lawes*, *supra*.

(*l*) *Nunn v. Fabian*, L. R. 1 Ch. 35; 35 L. Chanc. 140.

(*m*) *Haigh v. Kaye*, L. R. 7 Ch. 439.

(*n*) *Dale v. Hamilton*, 5 Hare, 381; *Morphett v. Jones*, 1 Swanst. 172; *post*, p. * 210; *Surcome v. Pinniger*, 3 D. M. & G. 571; *post*, p. * 1125.

(*o*) *Mundy v. Jolliffe*, 5 Myl. & Cr. 167; *post*, p. * 210.

(*p*) *Nunn v. Fabian*, *supra*.

(*q*) *Blackford v. Kirkpatrick*, 6 Beav. 232.

(*r*) *Ungley v. Ungley*, 5 Ch. D. 887, C. A.

(*s*) *Per James*, L. J., *Ex parte Hall*, 10 Ch. D. 619; *Clinan v. Cooke*, 1 Scho. & Leff. 40.

(*t*) *Alderson v. Maddison*, 7 Q. B. D. 174.

(*u*) *Britain v. Rossiter*, 48 L. J. 362, C. A. But see judgment of *Thesiger*, L. J.

contracts for an interest in land, and must be authenticated by a signed writing if the contract gives the party a right to any specific apartments; (*v*) but a contract to receive a man into a * house and provide him with board and lodging [* 161] generally, not giving him a right to any specific rooms, has been held not to be a contract for an interest in land. (*x*) So a contract to receive a ship into a graving dock has been held not to be a contract for an interest in land. (*y*) Agreements to furnish houses, entered into between a landlord and an intended lessee or tenant, where the occupation of the house forms the substance of the contract, and the furnishing of it is bargained for only in connection with such occupation, are also contracts for an interest in land. (*z*) If the agreement does not form part of a contract for the letting and hiring of a house, it is then, of course, only a sale and purchase of goods and chattels, and has nothing whatever to do with an interest in land.

Interest in Land. — Agreements for the Sale of a Milk-walk by which the plaintiff agrees to let the defendant into the occupation of premises, and the defendant agrees to pay rent, rates, and taxes, is a contract for an interest in land within the statute. (*a*)

Interest in Land. — Agreements to make Alterations and Repairs in Buildings entered into between a landlord and an intended lessee or tenant, where the principal subject-matter of the agreement is the letting of the buildings, and the improvements and alterations are accessorial thereto and contracted for only in connection with the lease, are contracts involving an interest in land within the statute, and cannot be enforced unless they are authenticated by writing. (*b*) Thus where the plaintiff, being possessed of a messuage and premises for the residue of a term, agreed to give up possession to the defendant for the residue, in consideration of the defendant's undertaking to do certain repairs to the premises, and the defendant, in pursuance of the agreement, became tenant for the residue of the term, but

(*v*) *Inman v. Stamp*, 1 Stark. 12; *Edge v. Strafford*, 1 C. & J. 391.

(*x*) *Wright v. Stavert*, 2 Ell. & Ell. 720; 29 L. J. Q. B. 161.

(*y*) *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402.

(*z*) *Vaughan v. Hancock*, 3 C. B. 766; 16 L. J. C. P. 1; *Simmons v. Simmons*, 12 Jur. 1.

(*a*) *Smart v. Harding*, 24 L. J. C. P. 76.

(*b*) *Vaughan v. Hancock*, 3 C. B. 766.

neglected to fulfil his promise to repair the house, it was held that this was an agreement relating to an interest in land within the statute. (c) But where a tenant in the actual occupation of a house under an existing demise orally agreed, in consideration that the landlord would put another story upon the house, to pay him £10 per annum upon the cost of the erection, in addition to the rent, and the additional story was built, and the landlord brought his action for the increased payment, it was held [*162] that the want of a written * contract formed no objection to the action. (d) A contract of this kind made by a tenant in the actual occupation and enjoyment of the land, and not forming part of the original contract of demise, seems to be a contract for work and labor and the supply of materials, rather than a contract involving an interest in land. And where the defendant agreed to make good all damage done by his workmen in quarrying stone from the plaintiff's land, it was held that this was not an agreement respecting land within the statute. (e)

Interest in Land. — Contracts for Services in Connection with the Transfer of an Interest in Land. — Where a lessee who was restrained from assigning his lease without license, agreed to assign the lease for £100, to be paid by the assignee, and to pay to his landlord £40 out of the £100 for a licence, and, the license being given and the assignment executed and the money received, he then refused to pay the £40 on the ground that there was no written agreement, it was held that the landlord might recover the £40 in an action for money had and received. (f) So where the plaintiff had made an oral agreement with one Emmanuel for the purchase of an estate for £600, and then agreed in writing with the defendant to sell him the bargain for £40, and the estate was afterwards at the plaintiff's request conveyed to the nominee of the defendant, it was held that the defendant was responsible for the payment of the £40. (g) In these cases, the contract being executed, the action

(c) *Buttmere v. Hayes*, 5 M. & W. 456; *Earl of Falmouth v. Thomas*, 1 Cr. & M. 89.

(e) *Griffiths v. Jenkins*, 10 Jur. N. S. 207.

(d) *Hoby v. Roebuck*, 7 Taunt. 157; 2

(f) *Griffith v. Young*, 12 East, 514,

Marsh. 433; *Seago v. Deane*, 1 Moo. & P. 227; 4 Bing. 459.

(g) *Seaman v. Price*, 1 Ry. & Mood. 195; *Green v. Saddington*, 7 Ell. & Bl. 503.

is in truth an action for a stipulated remuneration for services rendered. Where a contract consists of two collateral agreements, one only of which relates to an interest in land, then if that part of the contract has been executed, the fact of the whole contract not being in writing will not preclude an action on the other part founded on a promise to be performed after such execution; but one contract founded upon one consideration cannot be bisected so as to make a new contract and a new consideration out of one half. (*h*) Where the defendant, having no interest in a public-house, agreed to get the plaintiff a lease of it, it was held that this was a contract for an interest in land within the statute. (*i*)

Interest in Land. — Agreements concerning Landmarks and Boundaries. — If two occupiers of adjoining lands agree that a wall or fence shall be built by one of them as a boundary common to * both, and that the other shall pay his [*163] proportion of the expense, this is not a contract for an interest in land within the meaning of the statute, (*k*) and need not consequently be authenticated by a signed writing.

Interest in Land. — Contracts respecting Growing Crops — Grass — Timber, &c. — An agreement for the sale and purchase of growing grass (*primæ vesturæ*), growing timber or underwood, growing fruit and hops, not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in land, (*l*) as such things are not distinguishable from the land itself in legal contemplation until actual severance, and pass to the heir, and not to the executor; (*m*) but *fructus industriales*, such as growing crops of turnips, potatoes, and corn, and the annual productions of the soil raised by the labor of man, which are seizable by the sheriff under a *fi. fa.*, and pass to the executor and not to the heir, are considered goods and chattels; and contracts for the sale of them are, from this their original nature, considered to be

(*h*) *Hodgson v. Johnson*, E. B. & E. 248; *Scorell v. Boxall*, 1 Y. & J. 398; 689; 28 L. J. Q. B. 88. Sugd. Vend. c. 3, sect. 2; *Petch v. Tutin*, 15 M. & W. 115.

(*i*) *Horsey v. Graham*, L. R. 5 C. P. 9; 39 L. J. C. P. 58. (*m*) *Rodwell v. Phillips*, 9 M. & W. 504; *Waddington v. Bristow*, 2 B. & P. 455.

(*k*) *Stuart v. Smith*, 7 Taunt. 158.

(*l*) *Crosby v. Wadsworth*, 6 East, 610; *Carrington v. Roots*, 2 M. & W.

contracts for the sale of goods and chattels, and not of an interest in land, although they are to remain in the soil and derive a nutriment therefrom until they have arrived at maturity; and the mere license to come upon the land for the purpose of gathering and securing the crop, which is incident to such a contract, is not a sale of an interest in land within the meaning of the statute. (n) If fruit is sold at so much a bushel and timber at so much a foot, with a view to its immediate severance from the soil and delivery as a chattel to the vendee, the contract is not a contract for the sale of an interest in land, but for the sale of goods and chattels, "the produce of the trees when they should be cut down and severed from the freehold." (o) It is the same as if the parties had contracted for so much fruit already picked, or for so many feet of timber already felled. (p) But where a man agrees to hire the land and take the crops growing thereon at a valuation, and to pay a certain sum for work and [*164] labor and materials expended in *getting the lands ready for tillage, this is an entire contract for an interest in land; and the growing crops cannot in such a case be treated as goods and chattels. (q)

Where a contract was entered into for the sale of a crop of corn on the land and the profit of the stubble afterwards, and the vendor was to have liberty for his cattle to run with the purchaser's, and the purchaser was to have some potatoes growing on the land and whatever lay grass was in the fields, and was to harvest the corn and dig up the potatoes, and the vendor was to pay the title, it was held that this was not a contract for any interest in land, but a sale of goods and chattels as to all but the lay grass; and as to that, a contract for the agistment of the

(n) *Parker v. Staniland*, 11 East, 362; *Warwick v. Bruce*, 2 M. & S. 208; *Mayfield v. Wadley*, 3 B. & C. 357; 5 D. & R. 224; *Evans v. Roberts*, 8 D. & R. 614; 5 B. & C. 829; *Watts v. Friend*, 10 B. & C. 446; *Dunne v. Ferguson*, 1 Hayes, 540. Growing crops are not, however, goods and chattels within the Bills of Sale Act until severed; see *Brantom v. Griffiths*, 1 C. P. D. 349; 2 C. P. D. 212; *Ex parte National Mercantile Bank*, 16 Ch. D. 104; they will

pass in a will under the words farming stock, see *In re Rose*, 17 Ch. D. 696.

(o) *Smith v. Surman*, 9 B. & C. 568; *Marshall v. Green*, 1 C. P. D. 35.

(p) *Lord Abinger, Rodwell v. Phillips*, 9 M. & W. 505; *Rolfe, B., Washbourne v. Burrows*, 16 L. J. Exch. 266; 1 Exch. 115.

(q) *Earl of Falmouth v. Thomas*, 1 Cr. & M. 89; *Harvey v. Grabham*, 5 Ad. & E. 62.

purchaser's cattle. (r) If the contract is within the 4th section of the statute as a contract for the sale of an interest in land, it must be authenticated by writing; and if it does not fall within that section, but within the 17th, as a contract for the sale of goods and chattels, there must still be writing, unless the value of the subject-matter of the contract does not amount to £10, or the growing produce has been severed and delivered, or earnest has been given, or a part payment made, or there has been a part acceptance and receipt. (s)

Authentication of Executory Contracts for the Sale of Goods or Chattels.¹ — By the 17th section of the statute of frauds, no

Application of the statute of frauds to sales of goods, &c., see Browne, Stat. Fr. (4th ed. 1880) c. 14; acceptance and receipt, ib. c. 15; earnest and part payment, ib. c. 16. See further, 2 Kent, Com. 510; Story, Contr. (5th ed. 1874) sects. 1456-1567; Story, Sales, c. 8; *Furff v. Hires*, 17 Am. L. Reg. N. S. 11, and note; 18 Am. L. Reg. N. S. 161, and note.

What contracts for sale of goods are within the statute of frauds, see U. S. Dig. tit. Sales, sect. 50; what are not, sect. 63; necessity of a memorandum, sect. 80; its requisites and sufficiency, sect. 99; effect of part payment, sect. 171; effect of delivery and acceptance, sect. 181; what delivery will satisfy the statute, sect. 186; what will not, sect. 193.

Recent cases are: An oral agreement to buy all the progeny of a certain animal during a coming season is within the statute, and cannot be enforced unless the amount due on it is less than \$50. *Carpenter v. Galloway*, 73 Ind. 418.

Parol evidence is not admissible to supply the word "sold" needed in a bill of sale of goods, but omitted by mistake. *Lee v. Hills*, 66 Ind. 474.

A written order for merchandise, — *Held* a sufficient memorandum, though prices were not specified; and parol evidence was held admissible. *O'Neill v. Crain*, 67 Mo. 250; s. p. *Williams v. Robinson*, 73 Me. 186.

Giving a note (not negotiable) for part of the price of goods does not take an oral sale out of the statute. *Krohn v. Bantz*, 68 Ind. 277.

Giving valuable information may take a contract out of the statute equally with making a cash payment. Thus, where one gave a "point" in aid of a speculation in stocks, upon a promise by the other party to "carry" five thousand shares on his account for a specified time, without his furnishing margin, — *Held* that the agreement was valid. *White v. Drew*, 56 How. Pr. 53.

That the part payment on a sale of goods must be made at the time of making the sale, to take the case out of the statute, see *Hallenbeck v. Cochran*, 20 Hun, 416.

A symbolical delivery of bulky or inaccessible articles may satisfy the statute. *King v. Jarman*, 35 Ark. 190.

Delivery of merchandise sold, — here lumber, — and part payment of price, take the contract out of the statute. *Sloan Sawmill, &c. Co. v. Guttshall*, 3 Col. 8.

Requisites and sufficiency of memorandum. *Williams v. Robinson*, 73 Me. 186; *Hunter v. Wetsell*, 84 N. Y. 549; *Newberry v. Wall*, ib. 576.

Delivery of samples as mere specimens of quality is not a delivery of part of

(r) *Jones v. Flint*, 10 Ad. & E. 573. (s) *Marshall v. Green*, 1 C. P. D. 35.

contract for the sale of any goods, wares, and merchandise for the price of ten pounds sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or except some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized. This section was held not to extend to contracts for the making and manufacture of goods, *i. e.* contracts to make and complete and deliver at some subsequent period goods not in existence, and consequently not capable of delivery or of part acceptance at the time of the making of the contract, such as contracts to build a ship or make a chariot, &c., which were considered to be contracts for work and labor and the supply of materials, rather than contracts of sale; ^(t) whereupon the 9 Geo. IV., c. 14, sect. 7, was passed, which extends the provisions of the statute of frauds respecting the sale of goods to all contracts for the sale of goods of the value of £10 and upwards, "notwithstanding the goods may be intended to be delivered at some future time, or may not at the [*165] time of such contract be actually made, *procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof and rendering the same fit for delivery." ^(u) The statute applies only to executory contracts for the sale of goods and chattels, where the party sought to be charged as the purchaser has not accepted or received the goods. If the goods have been delivered to, and received by, the buyer, the latter cannot of course resist payment of the price on the ground that there is no memorandum in

the goods which can take an oral sale out of the statute. *Moore v. Love*, 57 Miss. 765.

To constitute acceptance and receipt of goods within the exception in the statute, not only must the title have vested in the buyer, but he must have the custody and control directly or by making the seller or some third person his agent or bailee. *Rodgers v. Jones*, 129 Mass. 420.

What amounts to a sufficient delivery and acceptance of goods sold, to satisfy the statute, see *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Hallenbeck v. Cochran*, 20 Hun, 416; *Hausman v. Nye*, 62 Ind. 485; *Keiwert v. Meyer*, *ib.* 587.

^(t) *Groves v. Buck*, 3 M. & S. 178.

^(u) *Lee v. Griffin*, 1 B. & S. 272; 30 L. J. Q. B. 252.

writing of the contract. (*v*) The two sections of these statutes are to be read together; and the consequence is that the word "value" in the last-named, is substituted for the word "price" in the first-named, statute. (*x*)

Contracts for the Sale of Fixtures¹ and Shares.²—Contracts for the sale of fixtures are not within the operation of the statute of frauds, inasmuch as they are not goods and chattels within the meaning of the statute, nor do they constitute, although annexed to the freehold, an interest in land. (*y*) Railway shares, also, and shares in the profits of a mine are neither interests in land, nor are they goods and chattels; and contracts for the purchase and sale of them are not, consequently, within the statute, and do not require to be authenticated by writing; (*z*) but the transfer of the share in fulfilment of a contract of sale must in general be made in writing or by deed. If each shareholder in a mine has a joint interest in the land itself, that interest cannot pass except in the mode prescribed by the 4th section of the statute of frauds; but if each shareholder has merely a right to a divisible proportion of the profits of the adventure, the case is not within the statute. (*a*)

Promises by Executors and Administrators.³—By the 4th

¹ See Browne, Stat. Fr. (4th ed. 1880) sect. 234; Ewell, Fixtures, 69, 150, 345; Tyler, Fixtures, c. 54, p. 728.

² Shares of stock in a corporation are within the statute of frauds, being embraced by the phrase "goods, wares, and merchandize," and a contract for the sale of them must be in writing. There is nothing in the nature of such stocks to exempt them from the purpose and policy of the statute, but, on the contrary, there are strong practical reasons why they should be deemed included. *Tisdale v. Harris*, 9 Pick. 9; *Fine v. Hornsby*, 2 Mo. App. 61; *Boardman v. Cutter*, 128 Mass. 338; see also Ang. & A. Corp. sect. 563; *Morawetz, Priv. Corp.*, sect. 643; 3 Pars. Contr. (6th ed. 1873) 49-51, citing also *Colvin v. Williams*, 3 Har. & J. 38; *North v. Forrest*, 15 Conn. 400; *Southern Life Ins. Co. v. Cole*, 4 Fla. 359.

³ See Browne, Stat. Fr. (4th ed. 1880) c. 153; 1 Throop, Verb. Agr., Part I. p. 35; see also 2 Story, Contr. sects. 1435, 1436.

A note given by distributees of an estate to a commission merchant, on a settle-

(*v*) *Searle v. Keeves*, 2 Esp. 598; *Mavor v. Pyne*, 11 Moore, 6; *Teal v. Auty*, 2 B. & B. 100.

(*x*) *Harman v. Reeve*, 18 C. B. 595.

(*y*) *Parke, B.*, 1 C. M. & R. 275;

Hallen v. Runder, ib. 266; 3 Tyr. 959;

Lee v. Risdon, 7 Taunt. 191; *Parke, J.*,

2 Sc. 249; *Pinner v. Arnold*, 1 Tyr. &

Gr. 1; *Lee v. Gaskill*, 1 Q. B. D. 700.

(*z*) *Parke, B.*, 6 M. & W. 214; *Humble v. Mitchell*, 11 Ad. & E. 205; *Bradley v. Holdsworth*, 3 M. & W. 422; *Tempest v. Kilner*, 3 C. B. 249; *Bowlby v. Bell*, ib. 284.

(*a*) *Watson v. Spratley*, 10 Exch. 243; *Powell v. Jessop*, 18 C. B. 354.

section of the statute of frauds, no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which any such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. We have already seen, (b)

that the promise of an executor or administrator to pay [* 166] the debt of his testator or * intestate is a mere *nudum pactum*, and does not impose any personal liability upon the latter, or make him chargeable in his own right, unless there is some consideration for the promise. And the putting of the promise into writing pursuant to the statute does not do away with the necessity of a consideration; "for the statute was made for the relief of personal representatives, and did not intend to charge them further than by common law they were chargeable." (c)

Promises to answer for the Debt, Default, or Miscarriage of Another.¹—The statute of frauds further enacts (sect. 4) that

ment had with the administrator for advances procured by him to make a crop on land of the estate, — *Held* not to be a promise to answer for the debt of another. *Locke v. Humphries*, 60 Ala. 117.

¹ As to the requirement that the contract must be in writing, see Baylies, Sur. & Guar. 61; what contracts are within the statute generally, 63; promise to pay promisor's own debt, 67; where the promisor holds property charged with the payment of the debt, 68; where there was some prior liability of the promisor or his property, 70; promises to indemnify and save harmless, 71. See further, Browne, Stat. Fr. (4th ed. 1880) c. 10, *Guaranties*; 1 Throop, Verb. Agr. Part II. p. 129-655; U. S. Dig. tit. *Guaranty*.

Recent cases are: A parol contract to answer in part for the debt of another must be in writing. *Luce v. Zeile*, 53 Cal. 54.

A promise by the president of a bank to a depositor that if the latter will not draw out his funds, but permit them to remain in the bank, the former will pay the total deposit if the bank should fail, must be in writing. *Walther v. Merrell*, 6 Mo. App. 370.

After a physician had made three visits to a patient, a third person promised orally to pay him for his attendance, — *Held*, that the promisor was liable for the subsequent visits, but not for the first three. *King v. Edmiston*, 88 Ill. 257. Otherwise where the physician had been called by one presumably liable, and the promise was to "see that the physician was paid." *Rose v. O'Linn*, 10 Neb. 364.

An oral promise by A to pay for materials furnished by B to C on a contract

(b) *Ante*, p. * 4.

(c) *Rann v. Hughes*, 7 T. R. 350, n.

no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage

made with C cannot be enforced so long as the latter contract remains unperformed and uncanceled. *Baker v. Ingersoll*, 39 Mich. 158.

The ordinary obligation of a factor *del credere* to be responsible for his sales, is not within the statute. *Suman v. Inman*, 6 Mo. App. 384.

A parol promise to pay the debt of another out of the funds transferred to the promisor, or to be supplied to him for the purpose, is not within the statute. *Justice v. Tallman*, 86 Pa. St. 147; *Cock v. Moore*, 18 Hun, 31; *Mason v. Wilson*, 84 N. C. 51.

The following have been held not to be promises to pay the debt, &c. of another. A person's promise, in effect, to pay his own debt, although incidentally guaranteeing that of a third person. *Darst v. Bates*, 95 Ill. 493; *Eagle Co. v. Shattuck*, 53 Wis. 455. An oral promise to indemnify another for becoming bail for a third, indicted for felony. *Anderson v. Spence*, 72 Ind. 315. An oral promise to pay the debt of a minor. *King v. Summitt*, 73 Ind. 312. A promise by a purchaser of land to pay an outstanding note of the grantor, as part of the purchase-money. *Morrison v. Hogue*, 49 Iowa, 574. Promises by a debtor to a creditor to pay to a third person, to the credit of the creditor, and in discharge of the latter's claim on the purchaser. *Lee v. Newman*, 55 Miss. 365; *Williams v. Rogers*, 14 Bush, 776; *Beardslee v. Morgner*, 4 Mo. App. 139; *Estabrook v. Gebhart*, 32 Ohio St. 415. A promise by one who purchased mortgaged premises after a default in payment of interest, that if the holders of the mortgage would not foreclose, he would pay the deferred instalment. *Prime v. Koehler*, 77 N. Y. 91. A warranty by the seller of a note that it is good and will be paid at maturity; for this amounts only to a promise to refund the price of the note if the maker does not pay. *Milks v. Rich*, 80 N. Y. 269; but compare *Frame v. August*, 88 Ill. 424. An unconditional promise to pay for goods supplied to a third person on the faith of the promise. *Morrison v. Baker*, 81 N. C. 76; *Hartley v. Varner*, 88 Ill. 561. A promise by a vendor of lands to the purchaser that vendor will pay off a mortgage upon the lands given to secure the debt of another person. *Green v. Randall*, 51 Vt. 67. A promise to unite with others in making or indorsing a note to be used in paying the debt of a third person. *State v. Shinn*, 42 N. J. L. 138. A promise by an assignee of a lease to pay off a mortgage upon the leased premises. *Goelet v. Farley*, 57 How. Pr. 174. For additional instances of oral promises sustained, see *Prime v. Koehler*, 7 Daly, 345; *Fleming v. Easter*, 6 Ind. 399; *Moore v. Stovall*, 2 Lea, 545; *Dee v. Downs*, 50 Iowa, 310; *Budd v. Thurber*, 61 How. Pr. 206; *Moorhouse v. Crangle*, 36 Ohio St. 130; *Simpson v. Hall*, 47 Conn. 417.

Various instances in which the promise was held to be such a promise to pay the debt, &c. of another, as must, by the statute, be in writing. *Richardson v. Robbins*, 124 Mass. 105; *Gower v. Stuart*, 40 Mich. 747; *Ingersoll v. Baker*, 41 Mich. 48; *Bonine v. Denniston*, ib. 292; *Frame v. August*, 88 Ill. 424; *Birchell v. Neaster*, 36 Ohio St. 331.

What amounts to an original undertaking, or is only a collateral one, see *Wagner v. Halleck*, 3 Col. 176; *Thatcher v. Rockwell*, 4 Col. 375; *Watkins v. Sands*, 4 Ill. App. 207; *Barrett v. McHugh*, 128 Mass. 165.

Where, on the faith of a third person's promise to pay the debt, a creditor discharged the primary debtor, the third person's engagement is original, not collateral. *Underwood v. Lovelace*, 61 Ala. 155; *Mathers v. Carter*, 7 Ill. App. 225.

"I will see that you are paid," are presumably words of collateral undertaking, not original. *Wagner v. Halleck*, 3 Col. 176; *Rose v. O'Linn*, 10 Neb. 364.

age of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This clause does not apply to the case where a party giving a guarantee is himself liable to the demand which he is purporting to guarantee; it must be exclusively the debt, default, or miscarriage of another. (*d*) But it applies to a promise to be answerable for a tortious act as well as a breach of contract; such as a promise to the lender of a horse to be answerable for the safe riding and re-delivery of it by the borrower, or a promise to the owner of a horse injured by an act of trespass, to make good the damage on condition that he would not sue the trespasser. (*e*) But it has been held that the statute applies only to promises made to the person to whom another is answerable (*f*), and that it must be a promise to answer for a debt of, or a default in some duty by, that other person towards the promisee, (*g*) and therefore that a promise by B to indemnify A against all liability if he would become bail for the appearance of C to answer a charge of mis-

One who induces a creditor to discharge his debtor and take the promisor as a substitute debtor, by representing to the creditor that he owes the debtor an equal sum and by fixing a time of payment and promising to pay, makes himself indebted to the creditor by an original, not a collateral undertaking. *Edenfield v. Canady*, 60 Ga. 456.

A letter from an attorney bespeaking official services from a clerk of court, and guaranteeing payment of his fees, — *Held*, a sufficient memorandum expressing the consideration. *O'Bannon v. Chumasero*, 3 Mont. T. 419.

Where A sells and delivers goods to B upon the faith of C's oral promise to "stand good" for the payment, payment of part of the debt by C is not such part-performance as renders the promise valid. *McGuaghey v. Latham*, 63 Ga. 67.

A written guaranty of the collection of a note made by a third party is not void as within the statute of frauds, because the consideration thereof is not therein expressed where such consideration arises solely out of a valid discharge by the guarantee of an obligation in his favor against the guarantor, wholly distinct and independent of the note. *Sheldon v. Butler*, 24 Minn. 513.

The words "for value received" in a guaranty sufficiently express the consideration within the statute of frauds. *Dahlman v. Hammel*, 45 Wis. 466.

(*d*) *Orrell v. Coppock*, 26 L. J. Ch. 269; *Couturier v. Hastie*, 22 L. J. Ex. 97. (*f*) *Eastwood v. Kenyon*, 11 Ad. & E. 446.

(*e*) *Birkmyr v. Darnell*, Raym. 1085; Salk. 28, n. b; 6 Mod. 249; *Kirkham v. Marter*, 2 B. & Ald. 613. (*g*) *Hargreaves v. Parsons*, 13 M. & W. 570; *Thomas v. Cook*, 8 B. & C. 728; *Reader v. Kingham*, 13 C. B. n. s. 344; 32 L. J. C. P. 108.

demeanor, is not a promise to answer for the debt or default of another within the statute, since no debt or duty was owing from C to A. (h) On the other hand, a promise to indemnify another from the consequences of becoming bail for a third person in a civil action has been held to be within the statute, — a decision which is to be supported, if at all, on the ground that the person bailed is legally bound to indemnify his bail by surrendering or paying the debt. (i) There can be no * suretyship unless there be a principal debtor, who may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time; but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt to be guaranteed. (k) A promise by one parishioner to indemnify another against the consequences of resisting a claim of tithe is not a promise to be responsible for the default of another, but a promise to pay what the promisee may lose by defending the promisor's interests in a suit. (l) If A in consideration that B will stay proceedings in an action he has commenced against C, to recover a sum of money due to him from C, promises to pay that money, such promise is a promise to answer for the debt of another within the 4th section of the statute. (m)

The operation of the statute is not confined to collateral undertakings to be answerable for a subsisting debt or duty; it extends to undertakings made before the debt accrues or the duty arises; and a guarantee, consequently, which a tradesman, before he sends out goods on credit, requires from a third party, because he does not like to trust the person for whose use the goods are intended, is within the statute, if the latter has been treated by the tradesman as his debtor. (n) Thus where the plaintiff, having commenced certain business for one Fox, refused to go on with it without a promise by the defendant to pay the

(h) *Cripps v. Hartnoll*, 4 B. & S. 414; 32 L. J. Q. B. 381; *Wildes v. Dudlow*, L. R. 19 Eq. 198.

(i) *Green v. Cresswell*, 10 Ad. & E. 453; but see *Batson v. King*, 4 H. & N. 739; 28 L. J. Ex. 327; and *Cripps v. Hartnoll*, 4 B. & S. 414; 32 L. J. Q. B. 381.

(k) *Lakeman v. Mountstephen*, L. R. 7 H. L. 17, *per* Ld. Selbourne, p. 24.

(l) *Adams v. Dansey*, 6 Bing. 506; 4 Moo. & P. 245.

(m) *Fish v. Hutchinson*, 2 Wils. 94.

(n) *Peckham v. Faria*, 3 Doug. 13; *Parsons v. Walter*, *ib.* 14, n. c.; *Matson v. Wharam*, 2 T. R. 80.

further expenses to be incurred, it was held that this promise was within the statute; (*o*) and where the defendant verbally promised that if the plaintiff would supply A with iron and take A's acceptances he would discount them, it was held that this was a promise to answer for the default of another, and, not being in writing, could not be enforced, on the ground that a contract to give a guarantee is required to be in writing as much as a guarantee itself. (*p*)

But the sale may be to one man, although the goods are to be delivered to another; and a person may promise to pay for goods supplied to, or for work done at his request or by his directions for, a third party as the real debtor, and not in the character of a surety; and if he has been treated by the person who has furnished the goods or done the work as the party liable, and credit has been given to him, his promise or undertaking to pay is not a collateral promise to answer for the debt of another, [*168] and the case *consequently is out of the statute. (*q*) If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, "If *he* does not pay you, *I* will," this is a collateral undertaking, void without writing by the statute. But if he says, "Let him have the goods, I will be your paymaster," this is an undertaking as for himself; and he shall be intended to be the very buyer. (*r*) If the person for whose use the goods are furnished is liable at all, or if his liability is made the foundation of a contract by another to be liable for the goods, the contract is a promise to indemnify, and is void if not in writing; but if the parties do not contemplate the liability of a principal debtor, the promisor is primarily liable and the contract is not within the statute. (*s*) Where the defendant, in consideration that the plaintiff, at the request of the defendant, would provide a workman with materials for his work, promised the plaintiff to pay him a reasonable sum for such materials out of such moneys received by him as should become due to the

(*o*) Barber v. Fox, 1 Stark. 270.

(*p*) Mallet v. Bateman, L. R. 1 C. P. 163; 35 L. J. C. P. 40.

(*q*) Hargreaves v. Parsons, 13 M. & W. 561; Mountstephen v. Lakeman, L. R. 7 Q. B. 196; 41 L. J. Q. B. 67.

(*r*) Birkmyr v. Darnell, 1 Salk. 27;

6 Mod. 250; Watkins v. Perkins, Raym. 224; Seaman v. Price, 1 C. & P. 586; 10 Moore, 34.

(*s*) Per Willes, J., Mountstephen v. Lakeman, L. R. 7 Q. B. 196; 41 L. J. Q. B. 67.

workman in respect of the work, it was held that this was not a promise by a surety to answer for the debt or default of another, within the meaning of the statute, but an original independent contract. (*t*) If goods are furnished to an infant at the request of the defendant, the defendant's undertaking or promise to pay for them is not a collateral promise to answer for the debt of another, inasmuch as the infant is not liable to pay for them, and cannot be indebted by reason of his minority. (*u*)

The contract of a factor binding him in the terms implied by a *del credere* commission is not within the statute of frauds. The contract is the factor's own contract; and the debt of another comes in incidentally only as a measure of damages. (*x*) Where the defendant, in consideration that the plaintiff would discharge a debtor out of custody, promised the plaintiff to pay him the debt, it was held that this was not a collateral promise to answer for the debt of another, the debt being extinguished by the discharge of the debtor. (*y*) Where the defendant, in order to get rid of an incumbrance on his own property, or to obtain some direct personal advantage to himself, promises to pay the debt of another, the promise is not within the statute. And if the original debt * be discharged and extinguished by [*169] the substitution in lieu thereof of a new contract by a third person to pay the amount of that debt, such new contract is not a collateral promise to answer for the debt or default of another. (*z*) Thus where a purchaser of goods, being unable to pay for them, transferred and delivered them to the defendant, and the latter promised the vendor to pay for them, it was held that this was a substitution of a new contract of sale and a new purchaser in lieu of the original contract of sale, that the original purchaser was discharged from all liability in respect of the

(*t*) *Andrews v. Smith*, 2 C. M. & R. 297; *Butcher v. Steuart*, 11 M. & W. 627; *Sweeting v. Asplin*, 7 M. & W. 173; 857; 12 L. J. Exch. 391; *Lane v. Burghart*, 1 Q. B. 937; *Bird v. Gammon*, 5 Gerish v. Chartier, 1 C. B. 13.

(*u*) *Harris v. Huntbach*, 1 Bur. 373; Sc. 213; 3 Bing. N. C. 883.
Duncombe v. Tickridge, Ayleyn, 94; 1 Wms. Saund. 211, d.

(*x*) *Wolff v. Koppell*, 5 Hill, N. Y. R. 746, 747; 3 B. & C. 855, 856; *Lacy v. M'Neile*, 4 D. & R. 7; *Taylor v. Hilary*, 1 C. M. & R. 743; 3 Dowl. 461.

(*y*) *Goodman v. Chase*, 1 B. & Ald.

goods, and that, his debt being extinguished, the promise was not a promise to be answerable for the debt of another. (a)

A contract or promise, although made concerning the debt or default of a third party, may yet be an original contract not within the statute. (b) If the plaintiff has a lien upon the goods and chattels of his debtor in his possession, or if he holds securities for the payment of his debt, and is induced either to give up his lien upon the goods or to part with his securities upon the faith of a promise made by the defendant to pay the amount of the plaintiff's claim thereon, the promise so made is not within the mischief intended to be provided against by the statute of frauds. (c) Where the plaintiff had distrained upon his tenant for rent in arrear, and afterwards delivered up the goods and chattels to the defendants, for the use of the tenant, upon the faith of an undertaking by the defendants to pay the rent, it was held that the undertaking was not within the statute. (d) The consideration need not appear in writing; see *post*, p. * 649.

Agreements in Consideration of Marriage.¹—The 4th section of the statute of frauds further enacts that no action shall be brought whereby to charge any person upon any agreement made in consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This does not extend to the marriage contract itself. Promises of marriage consequently are binding though not reduced into writing and signed by the party sought to be charged thereon. (e) But all promises and agreements made by [*170] one *person in consideration of the completion of a marriage by another are within the statute, and must be

¹ See Browne, Stat. Fr. (4th ed. 1880) c. 11; 1 Throop, Verb. Agr. Part III. p. 671; U. S. Dig. tit. *Husband and Wife*, sect. 330.

(a) *Browning v. Stallard*, 5 Taunt. 450. (b) *Walker v. Hill*, 5 H. & N. 419.

(c) *Barker v. Birt*, 10 M. & W. 61; *Barrell v. Trussell*, 4 Taunt. 117; *Meredith v. Short*, Salk. 25; *Castling v. Aubert*, 2 East, 325; *Walker v. Taylor*, 6 C. & P. 752; *Fitzgerald v. Dress-*

ler, 7 C. B. N. s. 374; 29 L. J. C. P. 113.

(d) *Edwards v. Kelly*, 6 M. & S. 204; *Williams v. Leper*, 3 Burr. 1887; *Bampton v. Paulin*, 12 Moore, 497; *Houlditch v. Milne*, 3 Esp. 86; 1 Wms. Saund. 211 d, 211 e, ed. 1845.

(e) *Cork v. Baker*, 1 Str. 34; *Harrison v. Cage*, 1 Raym. 386.

reduced into writing. The solemnization of the marriage does not take the case out of the operation of the statute. (*f*) A letter written by a father, signifying his assent to the marriage of his daughter with J. S., and that he would give her a marriage-portion of £500, was held a sufficient promise in writing within the statute. (*g*) A promise before marriage by the husband to the wife, that if she will forego a contemplated settlement, he will make the same provision for her by his will, is within the statute, and cannot be enforced if not made in writing. (*h*)

Agreements not to be performed within a Year.¹—The 4th section of the statute of frauds further enacts that no action

¹ See Browne, Stat. Fr. (4th ed. 1880) c. 13; U. S. Dig. tit. *Contracts*, sects. 697-746; ib. tit. *Vendor and Purchaser*, sect. 336; 3 Pars. Contr. (6th ed. 1873) 35-39; 2 Story, Contr. (5th ed. 1874) sects. 1442-1446; note to *Davy v. Shannon* by E. H. Bennett, 18 Am. L. Reg. N. S. 558.

Recent cases are: A contract between employers and an employee that he shall serve them and that they shall pay him a percentage of profits of the business with guaranty that the pay shall not be less than a specified sum per year, the services to commence at a future date, cannot be performed within a year, and must be in writing. *McElroy v. Ludlum*, 32 N. J. Eq. 828.

An agreement to teach school for one year, and for a second year at the same salary if no notice terminating it shall be given, may be performed within a year, and need not be in writing. *Smith v. Conlin*, 18 Hun, 234.

A promise to marry, if not to be performed within a year, must be in writing (by the New York statute); mutual promises to marry are excepted from the rule as to agreements upon consideration of marrying, but not from the rule as to contract not to be performed within a year. *Ulman v. Meyer*, 25 Alb. L. J. 408.

An agreement to take charge of a child till twenty-one years of age is valid though not in writing, though the child live more than a year, and will sustain an action for the agreed compensation; for the child might have died, and thus the agreement have been fully performed, during the first year. *McKinney v. McCloskey*, 8 Daly, 368. To the contrary, *Goodrich v. Johnson*, 66 Ind. 258.

The provision of the statute of frauds respecting contracts not to be performed in a year applies only to contracts not to be performed on either side; and not to a contract performed on one side within a year. *Smalley v. Greene*, 52 Iowa, 241.

An oral contract wherein a laborer agrees that he will not leave the service of his employer for two years, nor in the summer, nor without two weeks' notice, is within the statute of frauds. *Bernier v. Cabot Manuf. Co.*, 71 Me. 506.

Special contracts construed as requiring more than a year, see *Day v. New York Central R. R. Co.*, 22 Hun, 412; *Kellogg v. Clark*, 23 Hun, 393.

(*f*) *Caton v. Caton*, L. R. 1 Ch. 137; ib. 2 H. L. 127; 35 L. J. Ch. 292; 36 L. J. Ch. 886.

(*g*) *Countess of Mountague v. Maxwell*, 1 Str. 236; *Bird v. Blossie*, 2 Ventr. 361; *Bac. Abr. Agreements*, (C) 3.

(*h*) *Caton v. Caton*, L. R. 1 Ch. 137; ib. 2 H. L. 127; 35 L. J. Ch. 292; 36 L. J. Ch. 886; but see *Williams v. Williams*, 37 L. J. Ch. 854.

shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized. This extends to all contracts which are not by the terms of them to be fully and completely executed within a year. A part performance of the contract will not, consequently, take it out of the provisions of the statute. Thus where a person had become a subscriber to the “*Boydell Shakspeare*,” a work which was published in numbers, and could not be, and was not intended to be, completed within a year, and had taken and paid for several numbers as they came out and then refused to continue his subscription and complete the set, it was held that an action could not be maintained against him for his subscription, as there was no written contract signed by him according to the statute. (*i*) But if the contract has been wholly performed on the part of the plaintiff, it is no answer that there is no memorandum in writing; for the statute does not apply where the consideration is executed. (*k*) If the contract be for more than a year, the fact that it is defeasible within the year will not take it out of the operation of the statute. (*l*) A contract whereby a coachmaker agrees to let a carriage for a term of five years, in consideration of an annual payment for the use of it, but which by the custom of the trade is determinable at any time * within that period, on payment of a year’s hire, is an agreement not to be performed within a year, within the meaning of the statute. (*m*) So also is a contract for a year’s service to commence on a day subsequent to the making of the contract; for a contract which extends one minute beyond the time pointed out by the statute falls within its prohibition. (*n*) But a contract or general hiring for one

(*i*) *Boydell v. Drummond*, 11 East, 154, 158; *Sweet v. Lee*, 4 Sc. N. R. 90; *Roberts v. Tucker*, 3 Exch. 632.

(*k*) *Knowlman v. Bluett*, L. R. 9 Ex. 307.

(*l*) *Dobson v. Collis*, 1 H. & N. 84.

(*m*) *Birch v. The Earl of Liverpool*, 9 B. & C. 392.

(*n*) *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Snelling v. Lord Huntingfield*, 1 C. M. & R. 25; see *Cawthorn v. Cordrey*, 13 C. B. N. S. 406; 32 L. J. C. P. 152.

year from the time of the making of the contract, and so on from year to year so long as the parties shall respectively please, has been held not to extend beyond the time limited by the statute, and is not consequently within the provisions of the 4th section. (*o*)

Where the defendant entered the service of the plaintiff on the terms that if he should leave the employment he should not carry on the same sort of business within five miles, it was held that the agreement was *prima facie* not to be performed within a year. (*p*)

The statute does not extend to contracts which are to be performed upon the happening of some uncertain event, and which consequently may or may not be completed within a year. Thus it has been laid down that "where the agreement is to be performed upon a contingency, and it does not appear in the agreement that it is to be performed after a year, a note in writing is not necessary, for the contingent and uncertain event might happen within the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, a note is necessary." (*q*) An agreement, therefore, to pay the plaintiff so many guineas on the day of his marriage, was held not within the statute, although the marriage did not take effect for nine years, for it might have happened within a year. (*r*) So too a verbal promise founded upon a good consideration, to leave the plaintiff a legacy of a certain amount, has been held to be binding. (*s*) And where an oral promise was made to pay so much money on the return of a ship, which did not happen for two years, it was held that the promise was not within the statute, for the ship might have returned within the year, though by accident it happened that it did not. (*t*) Neither does the statute apply where the contract is wholly executed, or intended to be so, by one * of the parties thereto, [*172]

(*o*) *Beeston v. Collyer*, 12 Moore, 552; (*r*) *Peter v. Compton*, Skin. 353; 4 Bing. 309; *Giraud v. Richmond*, 2 C. Holt, 326; *Smith v. Westall*, 1 Raym. B. 835. 316.

(*p*) *Davy v. Shannon*, 4 Ex. D. 81, (*s*) *Ridley v. Ridley*, 34 L. J. Ch. per Hawkins, J. 462.

(*q*) *Wells v. Horton*, 12 Moore, 182, (*t*) *Anon.*, Salk. 280; *Fenton v. Emblers*, 3 Burr. 1282; 1 W. Bl. 353. 183; 4 Bing. 43, 44; *Smith v. Neale*, 2 C. B. N. s. 67; 26 L. J. C. P. 143.

within the year, although there are some acts to be done by the other party beyond the prescribed limit. Thus where a landlord agreed to lay out £50 in improvements upon the demised premises, and the tenant agreed to pay £5 per annum for the remainder of his term, of which several years were then unexpired, in addition to the reserved rent, and the £50 was expended within the year, and the landlord afterwards brought his action for the arrears of the £5, it was held that he was entitled to recover, though the agreement had not been put into writing and signed. (*u*)

Requisites of the Written Memorandum of the Contract.¹—If one person signs and forwards to another a written proposal, and this proposal is accepted and acted upon by the party to whom it is sent, there is a sufficient memorandum of the contract to satisfy the 4th section of the statute of frauds, and charge the sender, provided the terms of the contract can be ascertained from the written proposal construed in connection with the surrounding circumstances. (*x*) A letter making an offer or tendering certain terms for acceptance may be interpreted by the aid of other letters between the same parties referring to the same subject-matter, for the purpose of establishing the terms of a contract within the 4th section of the statute (*y*) provided no extrinsic evidence is

¹ As to the form, &c. of the memorandum, see Browne, Stat. Fr. (4th ed. 1880) c. 17; the contents of the memorandum, ib. c. 18; see further, 3 Pars. Contr. (6th ed. 1873) 4-19; 2 Story, Contr. (5th ed. 1874) sects. 1447-1455.

What is a sufficient memorandum, U. S. Dig. tit. *Contracts*, sects. 607-665; what is not, sects. 666-696. Williams v. Robinson, 73 Me. 186.

Recent cases are: A landowner's letter to his agent or broker, stating terms on which he will sell, is not available to a purchaser as a memorandum of the agreement of sale formed by his dealing orally with the agent. Steel v. Fife, 48 Iowa, 99; Albertson v. Ashton, 102 Ill. 50. Memorandum held insufficient because it contained besides date, &c. and signature, only figures and names of persons, but no intelligible terms of agreement. Reid v. Kenworthy, 25 Kan. 701. The requirements of a memorandum in writing, a signature, &c. are satisfied by sending an ordinary telegraphic despatch. Smith v. Easton, 54 Md. 138; s. p. Brinkman v. Hunter, 72 Mo. 172.

(*u*) Donellan v. Read, 3 B. & Ad. 906; Cherry v. Henning, 4 Exch. 631; Mayor v. Pyne, 11 Moore, 2.

(*v*) Smith v. Neale, 2 C. B. N. s. 67; 26 L. J. C. P. 143; Reuss v. Picksley, L. R. 1 Ex. 342; 35 L. J. Ex. 218; Peek v. The North Staffordshire Railway Com-

pany, 32 L. J. Q. B. 241; Warner v. Willington, 3 Drew. 523; Liverpool Borough Bank v. Eccles, 4 H. & N. 143; 28 L. J. Ex. 122; Bird v. Blosse, 2 Ventri. 361; Ld. St. Leonard's, Ridgway v. Wharton, 6 H. L. C. 293.

(*y*) Peek v. The North Staffordshire

required to connect them. (z) And indeed any printed papers or communications in writing which may have passed between the parties, forming on the face of them part of one connected transaction, may be incorporated and construed together, and made to establish the requisite written evidence of an "agreement." (a) But the names of the parties and the terms of the contract must appear from a comparison of the writings themselves; and they must manifestly refer to the same contract and transaction, and must not be contradictory to each other. (b) It has also been held that parol evidence might be admitted to identify an unsigned agreement as being the one referred to in a signed minute in a * minute-book, (c) or a receipt by [* 173] the defendant for a deposit as being given in respect of the same subject-matter as an agreement signed only by the plaintiff; (d) or a reference in a signed letter by the defendant to a memorandum signed by the plaintiff. (e)

If two parties have entered into an agreement for the performance of particular acts or duties, it is not necessary to show that the memorandum of the agreement has been signed by both parties, in order to render the one who has signed it liable upon the contract. Thus, if an agreement has been made by word of mouth for the purchase and sale of an estate, and the purchaser signs a memorandum by which he agrees to buy the property for a certain sum from the vendor, and the vendor is ready to establish his title, and is willing and offers to convey the property to the purchaser, the latter cannot escape from his agreement to buy by saying that the vendor had signed no memorandum of the contract, and was not himself liable upon it by reason of the

Railway Company, 32 L. J. Q. B. 241; 948; *Cooper v. Smith*, 15 East, 103; *Ridgway v. Wharton*, 6 H. L. C. 238; *Jackson v. Lowe*, 1 Bing. 9; *Smith v. Surman*, 9 B. & C. 561; *Williams v. Lake*, 2 Ell. & Ell. 349; 29 L. J. Q. B. 1.

(z) See *Chapman v. Callis*, 9 C. B. n. s. 769; 30 L. J. C. P. 241; *Peek v. North Staffordshire Railway Company*, 32 L. J. Q. B. 241.

(a) *Bird v. Blosse*, 2 Ventr. 361; *Dobell v. Hutchinson*, 3 Ad. & E. 355; *Coe v. Duffield*, 7 Moore, 252; *Stead v. Liddard*, 8 ib. 2; *Baumann v. James*, L. R. 3 Ch. 508.

(b) *Kenworthy v. Schofield*, 2 B. & C.

(c) *Jones v. Victoria Graving-Dock Co.*, 2 Q. B. D. 314.

(d) *Long v. Millar*, 4 C. P. D. 450, C. A.; see also *Shardlow v. Cotterell*, 20 Ch. D. 90.

(e) *Cave v. Hastings*, 7 Q. B. D. 125.

statute. (*f*) So if a purchaser sends an order in writing signed by him for goods, which are selected and forwarded to him, and he then declines to receive them, it is no answer to an action for not accepting and paying for the goods, to say that there was no memorandum of the contract signed by the vendor. (*g*) But, although it is not necessary that both parties should sign the memorandum, both parties must be specified either nominally or by a sufficient description or reference, (*h*) unless the plaintiff has estopped himself from repudiating the contract. (*i*) Thus, in the case of a bargain and sale of goods and chattels, it must appear, from the memorandum signed by the purchaser, that the plaintiff is the vendor; for if that is left wholly uncertain, the memorandum will be insufficient. (*k*) And where a price is agreed upon at the time of the sale, it must be set forth on the face of the memorandum. (*l*) So also before the court will decree specific performance of a contract for sale of real property, it [** 174*] must be * sufficiently described in the receipt or memorandum. (*m*) Again, if the contract is a contract for the performance by the parties of mutual recurring acts and services from time to time, both must be bound by the contract, or neither can be made liable upon it, (*n*) except in respect of acts done and services actually rendered. Thus if a servant signs a memorandum of agreement by which he undertakes to serve his employer for more than a year, and enters upon the service, he is

(*f*) *Hatton v. Gray*, 2 Ch. C. 164; *Fowle v. Freeman*, 9 Ves. 351; *Seton v. Slade*, 7 Ves. 264; *Laythorp v. Bryant*, 2 Bing. N. C. 735; 3 Scott, 238.

(*g*) *Egerton v. Mathews*, 6 East, 307; *Liverpool Borough Bank v. Eccles*, 4 H. & N. 143; 24 L. J. Ex. 122; *Allen v. Bennet*, 3 Taunt. 169.

(*h*) *Williams v. Lake*, 2 Ell. & Ell. 349; 20 L. J. Q. B. 1; *Sale v. Lambert*, L. R. 18 Eq. 1; *Commins v. Scott*, L. R. 20 Eq. 11; *Catlin v. King*, 5 Ch. D. 660; *Williams v. Jordain*, 6 Ch. D. 517.

(*i*) *Thomas v. Brown*, 1 Q. B. D. 714.

(*k*) *Champion v. Plummer*, 1 N. R. 252; *Graham v. Musson*, 5 Bing. N. C. 603; *Sarl v. Bourdillon*, 1 C. B. N. s. 195; 26 L. J. C. P. 78; *Vandenburgh*

v. Spooner, L. R. 1 Ex. 316; 35 L. J. Ex. 201; *Potter v. Duffield*, L. R. 18 Eq. 4. But parol evidence may be given of the relative trades of the parties; and if from that it can be inferred with reasonable certainty which was the seller and which the buyer, that will be sufficient. *Newell v. Radford*, L. R. 3 C. P. 52; 37 L. J. C. P. 1.

(*l*) *Goodman v. Griffiths*, 1 H. & N. 576. As to the requisites of the memorandum of a contract of sale, see further, *post*, *915.

(*m*) *Shardlow v. Cotterell*, 18 Ch. D. 280; 20 Ch. D. 90, C. A.

(*n*) *Hoddesdon Gas Company v. Haselwood*, 6 C. B. N. s. 249; 28 L. J. C. P. 268.

nevertheless not bound by his agreement to serve for a year, unless the memorandum is also signed by the employer; for if the latter is not bound to employ for the term specified, the servant is not bound to serve. (*o*) But in all other respects, as regards work actually done and services rendered, the servant would be bound by the terms of his signed writing. (*p*)

In the case of a written memorandum of an agreement for a lease, if the memorandum construed in connection with other writings therein referred to and with surrounding circumstances leaves the commencement or the duration of the term wholly uncertain, there is no binding contract. (*q*) If a party writes a letter admitting the essential particulars of the contract, but containing a repudiation of the bargain upon bad or insufficient grounds, the letter will constitute a good memorandum of the contract within the statute. (*r*) The agreement must be completed before the letter can be evidence of a binding contract. (*s*) It was formerly held that the note or memorandum of a promise to answer for the debt, default, or miscarriage of another must disclose upon the face of it the consideration for the promise; (*t*) but by the 19 & 20 Vict. c. 97, sect. 3, "no such promise, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document." The consideration, therefore, may be supplied by oral evidence, but not the nature and extent of the promise itself. (*u*) * In the case of a guarantee the name of the [* 175] party to whom it is given must be stated on the face of

(*o*) *Sykes v. Dixon*, 9 Ad. & E. 693.

(*p*) *Collis v. Botthamley*, 7 W. R. 87; *Souch v. Strawbridge*, 2 C. B. 808; L. J. C. P. 172.

(*q*) *Bayley v. Fitzmaurice*, 8 Ell. & Bl. 679; *Fitzmaurice v. Bayley*, 27 L. J. Q. B. 143; *Clarke v. Fuller*, 16 C. B. N. s. 24; *Nesham v. Selby*, L. R. 13 Eq. 191; 41 L. J. Ch. 551; see, however, *Kusel v. Watson*, 11 Ch. D. 129.

(*r*) *Bailey v. Sweeting*, 9 C. B. N. s. 843; 30 L. J. C. P. 154; *Wilkinson v. Evans*, L. R. 1 C. P. 407; 35 L. J. C. P. 224; *Buxton v. Rust*, L. R. 7 Ex. 279; 41 L. J. Ex. 173.

(*s*) *Munday v. Asprey*, 13 Ch. D. 855.

(*t*) *Powers v. Fowler*, 4 Ell. & Bl. 511.

(*u*) *Holmes v. Mitchell*, 7 C. B. N. s. 361; 28 L. J. C. P. 301.

the memorandum; for parol evidence is inadmissible to supply the omission. (*x*) But if the writing is not strictly a guarantee — if it is a general order or authority to any person who may choose to act upon it, authorizing the supply of goods to a third party, and promising to pay for the goods so supplied — it may be sued upon as an original contract. (*y*) A written admission by a purchaser to his agent that he had bought certain goods for him is a sufficient note or memorandum of the bargain between him and the vendor. (*z*)

Of the Signature to the Memorandum.¹ — If a man writes his name in the first person, as “I, James Crockford, agree,” &c., (*a*) or in the third person, as “Mr. Stanley agrees,” (*b*) this is a sufficient signature. But the mere insertion of the name of the contracting party in the body of a written contract is not of itself a sufficient signature. For though the signature need not be placed in any particular part of the instrument, yet it must be so introduced as to govern or authenticate every material and operative part of it. (*c*) Therefore, where the defendant Moore wrote instructions for a lease to the plaintiff in these words: “The lease renewed; Mrs. Stokes to pay the king’s tax, also to pay Moore £24 a-year half yearly; Mrs. Stokes to keep the house in good and tenantable repair,” &c., it was held that Moore, by writing his own name in the body of the instructions, had not signed an agreement for the renewal of the lease within the intent and meaning of the statute. (*d*) If the agreement concludes “as witness our hands,” or contains any words showing that the names of the contracting parties were to be subscribed,

¹ See U. S. Dig. tit. *Contracts*, sects. 607–696. That signing by the party to be charged, only, is sufficient, see *Douglass v. Spears*, 2 Nott & M. 207, 10 Am. Dec. 588; *Russell v. Nicoll*, 3 Wend. 112, 20 Am. Dec. 670; *McCrea v. Purnmort*, 16 Wend. 460, 30 Am. Dec. 103, and note by A. C. Freeman, *ib.* 116; *Crutchfield v. Donathon*, 49 Tex. 691.

(*x*) *Williams v. Lake*, 2 E. & E. 349; *v. Parker*, 1 Russ. & Myl. 625; *Bleakly v. Smith*, 11 Sim. 150.

(*y*) *M’Kune v. Joynton*, 5 C. B. N. s. 218; 28 L. J. C. P. 133. (*b*) *Lobb v. Stanley*, 5 Q. B. 574; *Johnson v. Dodgson*, 2 M. & W. 653.

(*z*) *Gibson v. Holland*, L. R. 1 C. P. 1; 35 L. J. C. P. 5. (*c*) *Caton v. Caton*, L. R. 2 H. L. 127; *Ogilvie v. Foljambe*, 3 Mer. 53; *Kronheim v. Johnson*, 7 Ch. D. 60.

(*a*) *Knight v. Crockford*, 1 Esp. 190; *Taylor v. Dobbins*, 1 Str. 399; *Propert* (*d*) *Stokes v. Moore*, 1 Cox, 222, 223.

there is no signing within the statute, unless the names of the parties are duly subscribed at the foot of the instrument. (*e*)

The civil law did not require the signature of a party to a written contract, if the contract was in his own handwriting. (*f*) But in our own law, if the defendant has written the whole contract with his own hand, without signing it as a concluded agreement, this is not sufficient, as the statute has made signing absolutely necessary for the completion of the contract. (*g*) A party may under certain circumstances be bound by his signature, although * he subscribed in form as a wit- [* 176] ness. (*h*) “What, within the legal intent of the statute, will amount to a signing, is the same question in equity as at law.” (*i*) Where an offer was accepted by the defendant by telegram, and the instructions for the message were signed by the defendant, and the telegram received by the plaintiff contained the message with the names of the sender and receiver written by the telegraph clerk on the usual printed form, it was held that there was a sufficient signature within the statute. (*k*) If a letter is signed and sent in an envelope containing a separate unsigned document by the same writer, and headed “supplement,” and commencing, “I had quite omitted to tell you,” but without any other reference to the letter or the letter to it, it was held that the unsigned document did not satisfy the statute of frauds. (*l*) If a man writes his name in the vendor’s order-book, intending it as an order or authority to the vendor to send him certain goods specified therein with the prices, this is a sufficient signature. (*m*) So, if he writes his name against an entry or memorandum in a book or ledger, or indorses his name on printed particulars of sale, printed handbills, or printed descriptions, specifying the goods and the price, with intent to denote that he has purchased the contents, this is a sufficient signature ;

(*e*) *Hubert v. Treherne*, 3 M. & Gr. 743; 4 Sc. N. R. 486.

(*f*) Inst. lib. iii. tit. 24.

(*g*) *Ithel v. Potter*, cited 1 P. Wms. 771.

(*h*) *Welford v. Beezely*, 1 Ves. sen. 6; *Gosbell v. Archer*, 2 Ad. & E. 508; 4 N. & M. 494.

(*i*) *Morison v. Turnour*, 18 Ves. 183.

(*k*) *Godwin v. Francis*, L. R. 5 C. P. 295; 39 L. J. C. P. 121.

(*l*) *Kronheim v. Johnson*, 7 Ch. D. 60.

(*m*) *Sarl v. Bourdillon*, *ante*, p. *173; *Newell v. Radford*, 37 L. J. C. P. 1; L. R. 3 C. P. 52.

and the name may be written in pencil as well as in ink. (*n*) A man may sign also by his initials, or by his mark, (*o*) or by a stamp; (*p*) and it is quite immaterial upon what part of the paper the mark or signature is to be found. But the signature must, of course, be made with a view of authenticating the document as a concluded contract, and not with a view merely of altering or settling a draft, or approving of propositions and proposals not finally arranged and decided upon. (*q*) It seems that it is not essential that the signature should be placed for no other purpose than to authenticate the contract, as where a chairman of a company signed a minute in the minute-book for the purpose of verifying the accuracy of the entry, but the entry was in terms an admission of the contract; (*r*) but where shareholders signed as between themselves articles of association in which there was a clause stating that the plaintiff should be solicitor to the company, the signatures were held to [*177] have been made ** alio intuitu*, and that the plaintiff could not sue on the contract. (*s*)

Signature by Agents.¹ — Where the note or memorandum is signed by an agent, it is not necessary that the agent should obtain his authority by any written instrument. It has been held, consequently, that the name of the party sought to be charged, printed by a printer in particulars of sale, or in any other printed paper embodying the terms of the contract, may be a signature, by “a person lawfully authorized” within the meaning of the statute. If the party has recognized and adopted his printed name or signature, — if, for instance, he has sanctioned or permitted the distribution of printed handbills or printed particulars of sale in which his name appears, — there has been a signature by an agent duly authorized, upon the principle that the subsequent sanction or adoption of the printed

¹ As to signature by auctioneer, see U. S. Dig. tit. *Auction*, sect. 36.

(*n*) Geary v. Physic, 5 B. & C. 234; (*q*) Coldham v. Showler, 3 C. B. 320; 7 D. & R. 353. Hawkins v. Holmes, 1 P. Wms. 770;

(*o*) Hubert v. Moreau, 12 Moore, 219; Doe v. Pedgriph, 4 C. & P. 312.

Phillimore v. Barry, 1 Campb. 513; (*r*) Jones v. Victoria Graving-Dock

Hyde v. Johnson, 2 Bing. N. C. 780; Co., 2 Q. B. D. 314.

Jacob v. Kirk, 2 Mood. & Rob. 221. (*s*) Eley v. Positive Government Se-

(*p*) Bennett v. Brumfit, 37 L. J. C. P. curity Co., 1 Ex. D. 20, C. A. 88.
25.

name or signature is equivalent to an antecedent authority to the printer to print it. (*t*) If an agent has signed a contract without authority, and the principal subsequently adopts the contract or ratifies the transaction, he is bound by the agent's signature. (*u*) But the mere introduction of a name into a written or printed paper unrecognized by the party and not brought home to him as having been written or printed by his authority is, of course, no signature within the meaning of the statute. (*x*) A mere clerk or traveller of one party cannot be treated as an agent to bind the other, unless it be shown that he has received specific and express authority so to do. (*y*) One of two or more partners may bind the others by signing the customary trading name of the firm to contracts for the purchase and sale of articles usually dealt in by the firm in the course of its business. (*z*)

An auctioneer effecting a sale by auction, or an auctioneer's clerk taking down the biddings in the presence of the purchaser, is during the continuance of the sale, but no longer, (*a*) the authorized agent of the vendor and purchaser, and is enabled to sign for both or either of the parties, so as to satisfy the statute of frauds; (*b*) and so is a broker who is employed to sell goods, and who signs and delivers bought and sold notes. (*c*) Neither of the contracting parties themselves can be the agent of the other *for such a purpose: (*d*) the agent contem- [*178] plated by the legislature who is to bind a defendant by his signature, must be some third person; and an auctioneer who signs the defendant's name by his authority cannot afterwards sue the latter upon the contract authenticated by such signa-

(*t*) *Schneider v. Norris*, 2 M. & S. 337; *Murphy v. Boese*, L. R. 10 Ex. 288; *Maclean v. Dunn*, 1 Moo. & P. 766; 126.

Saunderson v. Jackson, 2 B. & P. 238. (*z*) *Norton v. Seymour*, 3 C. B. 792.

(*u*) *Fitzmaurice v. Bayley*, 6 E. & B. L. J. Exch. 39. (*a*) *Mews v. Carr*, 1 H. & N. 488; 26

868; 26 L. J. Q. B. 114; *Bigg v. Strong*, 4 Jur. N. s. 983. (*b*) *Hinde v. Whitehouse*, 7 East, 568; *Emmerson v. Heelis*, 2 Taunt. 38;

(*x*) *Hubert v. Turner*, 4 Sc. N. R. 506; 3 M. & Gr. 343. *White v. Proctor*, 4 Taunt. 209; *Bird v. Boulter*, 4 B. & Ad. 447.

(*y*) *Graham v. Musson*, 7 Sc. 769; (*c*) *Rucker v. Canmeyer*, 1 Esp. 104. *Graham v. Fretwell*, 4 Sc. N. R. 25; (*d*) *Wright v. Dannah*, 2 Campb. 203;

Blore v. Sutton, 3 Mer. 245; *Durell v. Sharman v. Brandt*, L. R. 6 Q. B. 720; *Evans*, 1 H. & C. 174; 31 L. J. Exch. 40 L. J. Q. B. 312.

ture. (e) If the signature was made by the auctioneer's clerk, the auctioneer may then sue upon the contract. (f) The agency of an auctioneer, and his authority to bind the bidder by his signature, may be rebutted by showing a contract between the vendor and the bidder inconsistent with such agency. Thus, where goods were directed to be sold by auction by an executor, and the latter, before the sale, agreed with a legatee that he might bid at the sale any amount under £200, and that the price should be set off against the legacy, and the legatee accordingly attended and became the purchaser of goods to the amount of £145, and his name was written down on the conditions of sale by the auctioneer, it was held that the auctioneer was not, under the circumstances, an agent to bind the legatee so as to render the latter responsible for the non-payment of the price according to the terms of the conditions. (g)

Unconscientious Use of the Statute of Frauds. — Where by the fraud of one of the parties to a contract it has not been reduced into writing, he will not be allowed to set up the statute. (h)

Confirmation of Promises made by Infants. — Formerly promises made by infants could only be ratified by a signed writing; but now "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." (i)

Executory Promises requiring Authentication by Deed. — All unilateral or one-sided undertakings and engagements, where there is no mutuality of contract and nothing is given or agreed to be done, and nothing has been done, as the consideration or inducement for the promise, must be authenticated by deed in order to enable the promisee to maintain an action for the non-performance of them. Thus, as we have already seen, if one man promises another to build him a house or to render him

(e) *Farebrother v. Simmons*, 5 B. & Ald. 33.

(f) *Bird v. Boulter*, 4 B. & Ad. 443; 1 N. & M. 313.

(g) *Bartlett v. Purnell*, 4 Ad. & E. 792; *Ld. Glengall v. Barnard*, 1 Kee. 769.

(h) *Lincoln v. Wright*, 4 D. & J. 16; *Haigh v. Kaye*, L. R. 7 Ch. 469; *Booth v. Turle*, L. R. 16 Eq. 182.

(i) 9 Geo. IV. c. 14, sect. 5, repealed; 37 & 38 Vict. c. 62, sect. 2.

some certain service, and nothing is to be given or done by the promisee for the building or the service, no action lieth upon the promise; but * if the promise be made by [*179] deed, an action of covenant is maintainable upon the deed, and the consideration cannot then be inquired into (*ante*, p. * 2).

Authentication of Leases. — By the Act to Amend the Law of Real Property (8 & 9 Vict. c. 106, sect. 3) it is enacted that a lease, required by law to be in writing, (*l*) of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the 1st day of October, 1845, shall be void at law unless made by deed. It has been held that this statute refers only to legal estates, so that an equitable interest, such as an equity of redemption, may be assigned by a note or memorandum in writing without being under seal. (*l*) Nor does it apply to agreements to let tolls, which are regulated by the 3 Geo. IV., c. 126, and are valid if signed by the trustees, their clerk or treasurer, notwithstanding they are not under seal. (*m*) A lease not under seal for a term of less than three years, but giving a right to the lessee to continue to hold beyond three years, is invalid. (*n*) But a lease by simple contract for a term exceeding three years in duration,

(*l*) By the statute of frauds (29 Car. II. c. 3, sect. 1) "all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put into writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, except (sect. 2) all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at least of the full improved value of the

thing demised;" and (sect. 3) "no leases, estates, or interest either of freehold, or term of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered unless it be by DEED, or note in writing signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

(*l*) *Stamers v. Preston*, 9 Ir. C. L. R. 355, C. P.

(*m*) Sect. 57; see *Shepherd v. Hodsman*, 18 Q. B. 316; 21 L. J. Q. B. 263.

(*n*) *Hand v. Hall*, 2 Ex. D. 318.

though void as a lease, will operate as an agreement to grant a lease for the term specified, (*o*) and may be specifically enforced; (*p*) and a lease or agreement for a lease void as to the duration of the lease may regulate the terms upon which the tenancy subsists in other respects. (*q*)

The authority of an agent to make or execute a deed [* 180] for his *principal must be under seal, (*r*) except in the case of joint-contractors, one of whom, it has been held, may execute a deed for himself and the others without an authority under seal, provided he execute the deed for himself and the others *in the presence* of the others. (*s*)

(*o*) *Bond v. Rosling*, 30 L. J. Q. B. 227; *Drury v. Macnamara*, 5 Ell. & Bl. 616; 25 L. J. Q. B. 5; *Tidey v. Mollett*, 16 C. B. N. s. 308; 33 L. J. C. P. 235.

(*p*) *Parker v. Taswell*, 2 De G. & J. 559; 27 L. J. Ch. 812.

(*q*) *Doe v. Bell*, 5 T. R. 471; *Richardson v. Gifford*, 1 Ad. & E. 52; *Arden*

v. Sullivan, 14 Q. B. 832; 19 L. J. Q. B. 268; *Tooker v. Smith*, 1 H. & N. 732; *Tress v. Savage*, 4 Ell. & Bl. 43; 23 L. J. Q. B. 339.

(*r*) *Steigiltz v. Eggington*, 1 Holt, 141.

(*s*) *Ball v. Dunsterville*, 4 T. R. 313.

* CHAPTER II.

[* 181]

OF THE INTERPRETATION OF CONTRACTS.

SECTION I.

GENERAL PRINCIPLES OF INTERPRETATION.

Of the Construction of Contracts.¹—Every contract ought to be so construed that no clause, sentence, or word shall be super-

¹ Upon the general subject of interpretation or construction of contracts, see 2 Pars. Contr. 491-547; 1 Story, Contr. c. 20, sects. 771-818; Met. Contr. c. 5, 272-316; 2 Kent, Com. 727; 2 Minor, Inst. c. 24; 1 Wait, Act. & Def. 114; Report of a Proposed Civil Code for New York, Albany, 1865, sects. 800-826; U. S. Dig. tit. *Contracts*, 111. As to any distinction between "construction" and "interpretation," see those words in Abb. L. Dict. As to reception of parol evidence to aid in construction of a written contract, see Section II. *post*. The following are general rules:—

1. The actual intention of the parties at the time of contracting is the chief guide in the construction of contracts, and if this intent can be ascertained, and is lawful, it must govern. *Hollingsworth v. Fry*, 4 Dall. 345; *The Ida, Daveis*, 407; *Lemmons v. Flanakin*, Hempst. 32; *Watts v. Sheppard*, 2 Ala. 425; *Whitehurst v. Boyd*, 8 Ala. 375; *Steele v. Branch*, 40 Cal. 3; *Brown v. Slater*, 16 Conn. 192; *Benjamin v. McConnell*, 9 Ill. 536; *Robinson v. Stow*, 39 Ill. 568; *Walker v. Tucker*, 70 Ill. 527; *Hunter v. Miller*, 6 B. Mon. 612; *Hawes v. Smith*, 12 Me. 429; *Higgins v. Wasgatt*, 34 Me. 305; *People v. Gosper*, 3 Neb. 285; *Den v. Camp*, 19 N. J. L. 148; *Platt v. Lott*, 17 N. Y. 478; *Belmont v. Coman*, 22 N. Y. 438; *Tucker v. Meeks*, 2 Sweeny, 736; *Noyes v. Nichols*, 28 Vt. 159; Met. Contr. 274, 303; 2 Minor, Inst. 949-951; 2 Pars. Contr. 494, 503; 1 Story, Contr. (5th ed.) 773-776. If the contract was not written, its nature and terms must be ascertained as matter of fact from the conversations, negotiations, and acts of the parties by whom it was made. *Massey v. Belisle*, 2 Ired. L. 170; *Edwards v. Goldsmith*, 16 Pa. St. 43. If the contract was reduced to writing, the language of the written instrument, if lucid, is the best evidence of the intent. *Rogers v. Atkinson*, 1 Ga. 12; *Walker v. Tucker*, 70 Ill. 527; *Green v. Day*, 34 Iowa, 328; *Robb v. Bancroft*, 13 Kan. 123; *McLellan v. Cumberland Bank*, 24 Me. 566; *Jeffrey v. Grant*, 37 Me. 236; *Mumford v. McPherson*, 1 Johns. 414; *Howes v. Barker*, 3 Johns. 506; *Parkhurst v. Van Courtlandt*, 1 Johns. Ch. 273; *Westcott v. Thompson*, 18 N. Y. 367; *Norton v. Woodruff*, 2 N. Y. 339; *Buck v. Burk*, 18 N. Y. 339; *Dent v. North American Steamship Co.*, 49 N. Y. 390; *Watrous v. McKie*, 54 Tex. 65. Compare *Von Killer v. Schulting*, 50 N. Y. 108; 2 Pars. Contr. 496, 499, 548.

If parties make a writing, regarding it at the time as only provisional, but after-

fluous, void, or insignificant. Every word ought to operate in some shape or other; *nam verba debent intelligi cum effectu ut res*

wards adopt it as a written contract, its language (properly interpreted) will control. *Lawrence v. Dana*, 4 Cliff. 1; *Higgins v. Missouri, &c. R. R. Co.*, 73 Mo. 598.

If a contract, though awkwardly expressed, can be construed without the aid of parol evidence, it will be enforced according to its apparent terms. *Boyer v. Ausburn*, 64 Ga. 271.

Where the language of a contract is ambiguous, courts endeavor to ascertain and give effect to the intention of the parties. *Walker v. Tucker*, 70 Ill. 527.

2. When different parts of an agreement or a transaction have been by the parties embodied in different writings, all these writings may be construed and considered together, or as if they formed a single instrument. *Whitehurst v. Boyd*, 8 Ala. 375; *Sewall v. Henry*, 9 Ala. 24; *Casey v. Holmes*, 10 Ala. 776; *Byrne v. Marshall*, 44 Ala. 355; *Duncan v. Charles*, 5 Ill. 561; *Denby v. Graff*, 10 Ill. App. 195; *Thomas v. Austin*, 4 Barb. 265; *Allen v. Nofsinger*, 13 Ind. 494; *Akin v. Drummoud*, 2 La. Ann. 92; *Newall v. Wright*, 3 Mass. 138; *Hunt v. Livermore*, 5 Pick. 395; *Sibley v. Halden*, 10 Pick. 250; *Taunton, &c. Turnpike Corp. v. Whiting*, 10 Mass. 327; *Makepeace v. Harvard College*, 10 Pick. 298; *Hill v. Huntress*, 43 N. H. 480; *Cornell v. Todd*, 2 Den. 133; *Hanford v. Rogers*, 11 Barb. 18; *Hull v. Adams*, 1 Hill (N. Y.), 601; *Jackson v. Dunsbagh*, 1 Johns. Cas. 91; *Jackson v. McKenny*, 5 Wend. 233; *Wright v. Douglass*, 7 N. Y. 564; *Huttemeier v. Albro*, 18 N. Y. 48; *Hamilton v. Taylor*, ib. 358; *Church v. Brown*, 21 N. Y. 315; *Pepper v. Haight*, 20 Barb. 429; *Dean v. Lawham*, 7 Oreg. 422; *Wallis v. Beauchamp*, 15 Tex. 303; *Strong v. Barnes*, 11 Vt. 221; *Reed v. Field*, 15 Vt. 672; *Norton v. Kearney*, 10 Wis. 443; 2 Pars. Contr. 553, 554; 1 Story, Contr. sect. 806; 2 Minor, Inst. 952. This may be done notwithstanding the papers were made at different times (*Stacey v. Randall*, 17 Ill. 467; *Brandreth v. Sandford*, 1 Duer, 390; *Van Hagen v. Van Rensselaer*, 18 Johns. 420; *Sawyer v. Hammatt*, 15 Me. 40; *Adams v. Hill*, 16 Me. 215), but is not allowable unless the various papers were made between the same parties (*Graig v. Wells*, 11 N. Y. 315); relate to the same subject-matter (*Cornell v. Todd*, 2 Den. 130) or transaction (*Mann v. Witbeck*, 17 Barb. 388). In like manner, when one instrument makes reference, explicitly or tacitly, to another, the latter may be read to explain and complete the former (*Vaugine v. Taylor*, 18 Ark. 65; *Pillow v. Brown*, 26 Ark. 240; *Bradley v. Marshall*, 54 Ill. 173; *Dillingham v. Estill*, 3 Dana, 21; *Park v. Cooke*, 3 Bush, 168; *Adams v. Hill*, 16 Me. 215; *Rosalacher v. Lee*, 16 Mich. 169; *Rogers v. Kneeland*, 13 Wend. 114; *Smith v. Turpin*, 20 Ohio St. 478; *Phillips v. Scott*, 2 Watts, 318; *Spangler v. Springer*, 22 Pa. St. 454; *Wilson v. Randall*, 67 N. Y. 338; *Bobbitt v. Globe Ins. Co.*, 66 N. C. 71); and when the parties to a writing have indorsed upon it any admission, declaration, or memorandum of facts connected with the transaction, the same may be read with the principal paper to explain it (*Jones v. Overstreet*, 47 T. B. Mon. 517; *Langdale v. People*, 100 Ill. 263; *Logan v. Tibbott*, 4 Greene, 389; *Heywood v. Perrin*, 10 Pick. 228; *Thomas v. Austin*, 4 Barb. 265; *Mallory v. Tioga R. R. Co.*, 3 Abb. App. Dec. 139; *Van Nostrand v. New York Guaranty, &c. Co.*, 39 N. Y. Superior Ct. 73). If parties to a contract made outside of the Gold Exchange insert in it a stipulation that it is made and shall be settled according to the rules of the Gold Exchange, those rules will govern. *Mills v. Gould*, 42 N. Y. Superior Ct. 119. Where two parties enter into a mutual agreement, which is evidenced by two papers each signed by one party and given to the other, the two instruments are to be construed as one. *Hunt v. Frost*, 4 Cush. 54. Compare *Judd v. Ensing*, 6

magis valeat quam pereat. One part must be so construed with another that the whole may, if possible, stand; but a clause or

Barb. 258, for the rule applicable when the two counterparts of an agreement retained by the parties respectively differ.

When a negotiation is conducted and completed by correspondence by mail or telegraph, all the letters or despatches in which the dealing is embodied may be read together to determine the contract; see *Stover v. Metzgar*, 1 Watts & S. 269. Commercial letters are not to be construed upon the same principle as bonds, but ought to receive a fair and reasonable interpretation, according to the true import of the terms, or to what is fairly to be presumed to have been the understanding of the parties; and the presumption is to be ascertained from the facts and circumstances accompanying the entire transaction. *Bell v. Bruen*, 1 How. 169; 17 Pet. 161; *Lawrence v. McCalmont*, 2 How. 426. For instances in which a series of letters embodying a negotiation have been construed as a contract, see *Quincy Bank v. Hall*, 101 U. S. 43; *Strong v. Catlin*, 35 Ala. 607; *Ellis v. Crawford*, 39 Cal. 523; *Smith v. Bell*, 30 Ga. 919; *Kimbell v. Moreland*, 55 Ga. 164; *Bryant v. Booze*, ib. 438; *Stockham v. Stockham*, 32 Md. 196; *Hunt v. Johnson*, 24 Mo. 509; *Abbott v. Shepard*, 48 N. H. 14; *Frith v. Lawrence*, 1 Paige, 434; *Taylor v. Rennie*, 35 Barb. 272; *Trevor v. Wood*, 41 Barb. 255; *Wells v. Milwaukee, &c. R. R. Co.*, 30 Wis. 605; *Washburn v. Fletcher*, 42 Wis. 152. See further, 1 Pars. Contr. 483, 484, 525; 1 Story, Contr. (5th ed.) sects. 498-508.

3. It is the intention of the *parties*, the purpose and understanding which they held in common, not the design of either individually, which is to be ascertained and followed. *Briggs v. Vanderbilt*, 19 Barb. 222; *Brunhild v. Freeman*, 77 N. C. 128; *Rogers v. Broadnax*, 27 Tex. 238. The construction of a contract does not depend upon what either party thought, but upon what both agreed. *Brunhild v. Freeman*, 77 N. C. 128. Thus the language used by either party is to receive such a construction as he at the time supposed the other party would give to it, or such a construction as the other party was fairly justified in giving to it. *Barlow v. Scott*, 24 N. Y. 40; *Gunnison v. Bancroft*, 11 Vt. 490. The law will presume that a person meant what his language by its terms, and under the circumstances in which it was used, would be fairly understood to mean, and this presumption cannot be rebutted by proof that he intended something more or different, which he made no attempt to express, and which a person dealing with him neither understood nor had reason to understand. *Clark v. Lillie*, 39 Vt. 405; *Locke v. S. C. & P. R. Co.*, 46 Iowa, 109; *S. P. Merriam v. Pine City Lumber Co.*, 23 Minn. 314. But the understanding or intention of a party to a contract does not in all cases limit his liability. *White v. Van Horn*, 19 Iowa, 189. One is not bound to do acts not contracted for, merely because he knew that the other party expected and understood he would perform them. *Sanford v. Howard*, 29 Ala. 684; *Johnson v. Sellers*, 33 Ala. 265. The construction of a written agreement cannot depend on the motives, purposes, or expectations of a party to it, as contradistinguished from the plain import of the words used. *Watrous v. McKie*, 54 Tex. 65. See further, 2 Pars. Contr. 494, 500, 505; 1 Story, Contr. (5th ed.) sects. 774-779; 2 Minor, Inst. 949-951, 962.

4. In construing the language of written contracts to ascertain the intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view. *Lawrence v. Dana*, 4 Cliff. 1; *The Ida, Daveis*, 407; *Strong v. Gregory*, 19 Ala. 146; *Conwell v. Pumphrey*, 9 Ind. 135; *Montgomery v. Firemen's Ins. Co.*, 16 B. Mon. 427; *Murray v. Carothers*, 1 Met. (Ky.) 71; *White v. Booker*, 4 Met. (Ky.) 267;

particular sentence totally repugnant to the general intent of the contract is void, and must be rejected. (a) The terms of the

Akin v. Drummond, 2 La. Ann. 92; *Robinson v. Fiske*, 25 Me. 401; *Merrill v. Gore*, 29 Me. 346; *Higgins v. Wasgatt*, 34 Me. 305; *Salmon Falls Manuf. Co. v. Portsmouth Co.*, 46 N. H. 249; *Springstreen v. Samson*, 32 N. Y. 703; *Lacy v. Green*, 84 Pa. St. 514; *Tabb v. Archer*, 3 Hen. & M. 399. Technical legal terms of contract are not required, and their absence is unimportant if an actual agreement is shown (*Canal Co. v. Railroad Co.*, 4 Gill & J. 1; *Barney v. Worthington*, 37 N. Y. 112); but when terms of law are used in defining the obligations assumed by the parties, their technical legal sense should be preferred (*Ellmaker v. Ellmaker*, 4 Watts, 89; *Findley v. Findley*, 11 Gratt. 434); yet the fact that the parties have designated the contract by a particular legal name will not prevent its being treated according to its real nature (*Heryford v. Davis*, 102 U. S. 235). In general, words having a popular and also a technical sense will be presumed to have been used in the former. *Hawes v. Smith*, 12 Me. 429; *Casler v. Connecticut Mutual Life Ins. Co.*, 22 N. Y. 427; *Schenck v. Campbell*, 11 Abb. Pr. 292; *Mansfield, &c. R. R. Co. v. Veeder*, 17 Ohio, 385; *Schuykill Nav. Co. v. Moore*, 2 Whart. 491. The punctuation may be considered whenever it aids in fixing the meaning, but it does not control (*English v. McNair*, 34 Ala. 40; *Osborn v. Farwell*, 37 Ill. 89; *White v. Smith*, 33 Pa. St. 186); neither do rules of grammar (*Nettleton v. Billings*, 13 N. H. 446; *Tucker v. Meeks*, 2 Sweeny, 736; *Gray v. Clark*, 11 Vt. 583).

5. A written contract should be read as a whole; all its provisions are to be considered, and the general design must not be frustrated by allowing too much force to single words or clauses. *Brown v. Slater*, 16 Conn. 192; *Stewart v. Preston*, 1 Fla. 10; *Stout v. Whitney*, 12 Ill. 218; *Tracy v. Chicago*, 24 Ill. 500; *District Township v. Dubuque*, 7 Iowa, 262; *Thompson v. Kelso*, 3 La. Ann. 577; *Henderson v. Rost*, 5 La. Ann. 441, 467; *Chase v. Bradley*, 26 Me. 531; *Merrill v. Gore*, 29 Me. 346; *Smith v. Davenport*, 34 Me. 520; *Chapman v. Seccomb*, 36 Me. 102; *Varnum v. Thruston*, 17 Md. 470, 496; *Sumner v. Williams*, 8 Mass. 214; *Knower v. Emerson*, 9 Pick. 422; *Haywood v. Perrin*, 10 Pick. 228; *Rose v. Roberts*, 9 Minn. 119; *Goosey v. Goosey*, 48 Miss. 210; *People v. Gosper*, 3 Neb. 285; *Salmon Falls Manuf. Co. v. Portsmouth Co.*, 46 N. H. 249; *Ward v. Whitney*, 8 N. Y. 412; *Hamilton v. Taylor*, 18 N. Y. 358; *Richards v. Warring*, 39 Barb. 42; *Kelley v. Upton*, 5 Duer, 340; *Tucker v. Meeks*, 2 Sweeny, 736; *Kelly v. Mills*, 8 Ohio, 325; *Stewart v. Lang*, 37 Pa. St. 201; *Williamson v. McClure*, ib. 402; *Swisher v. Grumbles*, 18 Tex. 164; *Tabb v. Archer*, 3 Hen. & M. 399. See further, 2 Pars. Contr. 501-506. Verbal criticism is subordinate, in construction, to the study of the intent. *Caldwell v. Layton*, 44 Mo. 220. Care must be taken to ascertain the meaning of all the parts, and to construe them in their relation to each other, and so that if possible they may operate harmoniously. *Baron v. Placide*, 7 La. Ann. 229; *Metcalf v. Taylor*, 36 Me. 28; *Heywood v. Heywood*, 42 Me. 229; *Hazleton, &c. Coal Co. v. Buck Mountain Coal Co.*, 57 Pa. St. 301. The various clauses must be read in subordination to the general purpose (*Decker v. Furniss*, 14 N. Y. 611; *Kelley v. Upton*, 5 Duer, 336), and clauses or words which appear repugnant to each other must, if practicable, receive such an

(a) *Parkhurst v. Smith*, Willes, 332; *Trenchard v. Hoskins*, Winch, 93; *Solly v. Forbes*, 2 B. & B. 38; 4 Moore, Domat's Civil Law, l. 1, tit. 1, sect. 2, 463; *Eyston v. Studd*, Plowd. 465; xi.; *Shep. Touch. 88*.

contract "are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the

interpretation as will give them operation consistent with the general purpose (*Decorah v. Kesselmeier*, 45 Iowa, 166; *Ward v. Whitney*, 8 N. Y. 442; *Casler v. Connecticut Mut. Life Ins. Co.*, 22 N. Y. 425; *Harper v. New York City Ins. Co.*, ib. 441. Yet whenever particular words or clauses appear to have been introduced with a purpose of restricting the general language, that effect will be given to them. *Bell v. Bruen*, 1 How. 169, 184; followed, *Lawrence v. McCalmont*, 2 How. 449; *Holmes v. Martin*, 10 Ga. 503; *Vaughan v. Porter*, 16 Vt. 266; *Baxter v. State*, 9 Wis. 38. However broad the general language of a contract may be, the obligation of the parties will be limited to those things as to which they intended to contract. *Platt v. Lott*, 17 N. Y. 478. A clause or a word may be rejected which is irreconcilable with the nature of the contract or the general design of the parties (*Stockton v. Turner*, 7 J. J. Marsh. 192; *Buck v. Burk*, 18 N. Y. 337; 1 Story, Contr. (5th ed.) sect. 809), or to which no meaning can be assigned in view of the connection in which it is used, and of the whole instrument (*Tucker v. Meeks*, 2 Sweeny, 736; *Decorah v. Kesselmeier*, 45 Iowa, 166). Parts of a general project or scheme, not intended to stand as separate and independent transactions, cannot be enforced while other parts of the scheme remain unaccomplished, but will be severally annulled and the parties left to their original rights. *Bell v. Bowers*, 4 Coldw. 311. Although a clause in a written contract would have by grammatical construction one application, yet if from the whole tenor of the writing it is manifest that the parties intended it should have a more extended effect, it will be construed according to the evident intention. *Morey v. Homan*, 10 Vt. 565.

6. Where a clause in a contract is susceptible of two constructions, it must be taken in the sense that will give to it some operation, rather than that which will have none. *Re Dunkerson*, 4 Biss. 227; *Evans v. Sanders*, 8 Port. 497; *Brown v. Slater*, 16 Conn. 192; *Riley v. Vanhouton*, 5 Miss. 428; *Peckham v. Haddock*, 36 Ill. 38; *Morancy v. Dumesnil*, 3 La. Ann. 363; *Steen-spring v. Bennett*, 16 La. Ann. 201; *Archibald v. Thomas*, 3 Cow. 284; *Richards v. Warring*, 39 Barb. 42; *Hunter v. Anthony*, 8 Jones L. 385; *Worrall's accounts*, 5 Watts & S. 111; *Thrall v. Newell*, 19 Vt. 202; see also 2 Pars. Contr. 503-505; 2 Minor, Inst. 954. Or if a clause is susceptible of two interpretations, one legal and the other illegal, that one must be preferred which makes the contract valid. *Chittenden v. French*, 21 Ill. 598; *Merrill v. Melchior*, 30 Miss. 516; *Lessley v. Phipps*, 49 Miss. 790; *Clark v. Pinney*, 7 Cow. 681; *Coyne v. Weaver*, 84 N. Y. 386. Thus, covenants tending in restraint of trade will be strictly construed. *Wiggins Ferry Co. v. Ohio, &c. Ry. Co.* 72 Ill. 360.

7. When portions of a contract are printed and others written, the written are to control the printed words if there is any inconsistency (*American Exp. Co. v. Pinckney*, 29 Ill. 392; *Woodruff v. Commercial, &c. Ins. Co.*, 2 Hilt. 122; *Harper v. New York City Ins. Co.*, 22 N. Y. 441; *Clark v. Woodruff*, 83 N. Y. 518), or, as the rule has been somewhat more precisely stated: Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form; and if the two are absolutely repugnant, the latter must be so far disregarded. Report N. Y. Civ. Code, sect. 816. See

subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the

also 2 Pars. Contr. 516; *Rush v. Carpenter*, 54 Iowa, 132. But of public contracts it has been said, that where contracts are prepared by the government on printed blanks, it is important that the unchanging (printed) portion should receive a uniform and unvarying construction. *Yates v. United States*, 15 Ct. of Cl. 120.

8. Language in a written contract which is of doubtful or ambiguous meaning will be construed most strongly against the person using the language, or who has caused the uncertainty to exist, and in favor of him who has been misled; especially if he has advanced his money upon it. *Evans v. Sanders*, 8 Port. 497; *Livingston v. Arrington*, 28 Ala. 424; *Union Bank v. Guice*, 2 La. Ann. 249; *Hoover v. Miller*, 6 La. Ann. 204; *Noonan v. Bradley*, 9 Wall. 394; *Barney v. Newcomb*, 9 Cush. 46; *Marion v. Stone*, 2 Cow. 781, 806. But this rule is one of last resort, applicable only where the language of the instrument will equally admit of either of two or more interpretations. *Falley v. Giles*, 29 Ind. 114. And the courts will endeavor to avoid a result which is unequal, unreasonable, and improbable. *Royalton v. Royalton, &c. Turnpike Co.*, 14 Vt. 311; *s. p. Whitis v. Polk*, 36 Tex. 502. Ambiguity in a public contract is attributed to the private party; in a private contract to the promisor. *Jackson v. Reeves*, 3 Cal. 293; and see *Mohawk Bridge Co. v. Utica, &c. R. R. Co.*, 6 Paige, 554. See further 2 Pars. Contr. 506; 1 Story, Contr. (5th ed.) sect. 811; 2 Minor, Inst. 953.

9. Entire and separable contracts, and apportionments, see *Huey v. Grinnell*, 50 Ill. 179; *Shinn v. Bodine*, 60 Pa. St. 182; *Newton v. Winchester*, 16 Gray, 208; *Allen v. Brown*, 43 Ga. 305; *Coburn v. Hartford*, 38 Conn. 290; *Barker v. Reagan*, 4 Heisk. 590; *Hollis v. Chapman*, 36 Tex. 1; *McDaniels v. Whitney*, 38 Iowa, 60; *Maryland Fertilizing, &c. Co. v. Lorentz*, 44 Md. 218; see also 1 Story, Contr. (5th ed.) sects. 25-34; 2 Pars. Contr. 517; note by A. C. Freeman on apportionment of contracts, 31 Am. Dec. 317; *Clark v. Sawyer*, 121 Mass. 224; *Quigley v. De Haas*, 82 Pa. St. 267; *Butler v. Butler*, 77 N. Y. 472; *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231 (and note by A. Biddle, 19 Am. L. Reg. N. S. 418); *Hartley v. Decker*, ib. 470; *Tenny v. Mulvaney*, 8 Oreg. 129; *Butler v. Rice*, 17 Hun, 406; *Tarbox v. Hartenstein*, 4 Baxt. 78; *Fingel v. Latour*, 81* Pa. St. 448; *Murphy v. St. Louis*, 8 Mo. App. 483; *Burckhardt v. Burckhardt*, 36 Ohio St. 261.

No precise rule can be laid down for the solution of the question whether a contract is entire or separable, but it must be solved by considering both the language and the subject-matter of the contract. When the price is expressly apportioned by the contract, or the apportionment may be implied by law, to each item to be performed, the contract will generally be held to be severable. *More v. Bonnet*, 40 Cal. 251.

The question as to whether a contract is entire or separable, depends to some extent upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract. *Southwell v. Beezley*, 5 Oreg. 458.

The consideration to be paid, not the subject or thing to be performed, determines whether a contract is entire or severable. A contract consisting of several distinct items and founded on a consideration which is apportioned to each item, is severable. *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351.

Providing for payments from time to time as the work progresses does not make the contract severable. *Cox v. Western Pacific R. R. Co.*, 44 Cal. 18.

A contract for a specific service at an agreed price is entire; and the price does

same words." (b) Technical words of law, however, are to have their legal effect, unless from subsequent inconsistent words it is

not become payable until the service is wholly rendered. *Rockwell v. Newton*, 44 Conn. 333.

One who for a stipulated price undertakes to find a purchaser for a farm, is not entitled to anything unless he finds a purchaser willing to buy the whole farm. *Weber v. Clark*, 24 Minn. 354.

On a subscription paper by which the subscribers are bound severally and not jointly, two subscriptions made at the same time and by the same person, but one in his individual name and the other with the addition, Ex'r, are separate contracts on which separate actions will lie. *Erie, &c. R. R. Co. v. Patrick*, 2 Abb. App. Dec. 72.

A contract which is for the sale of several distinct things, as for the sale of a town lot and personal property, but all for one consideration, is an entire contract, and not divisible, except by the consent of both parties thereto, and the making of a new contract. *Scheland v. Erpelding*, 6 Oreg. 258.

Where one enters into a special contract to perform a certain task, and after performing a part of it fails for some reason other than a voluntary abandonment to complete the work, the part performed being of value to the person by whom he was employed, the employee may recover for such service its reasonable value after deducting any damages the employer may have sustained by reason of its non-completion. *Steeple v. Newton*, 7 Oreg. 110.

A joint contract by two persons for the purchase of land is an entirety, and cannot be repudiated by one without the assent of the other. *Merriman v. Norman*, 9 Heisk. 269.

10. Joinder, and whether contracts will be constituted as joint, or joint and several, or several, see 1 Pars. Contr. 11; 1 Story, Contr. (5th ed.) sects. 52-71; 2 Minor, Inst. 750; *Stowers v. Blackburn*, 21 La. Ann. 137; *Mortland v. Holton*, 44 Mo. 58; *New Haven, &c. Co. v. Hayden*, 119 Mass. 361.

An agreement between a number of persons to "pay the sums annexed to their names," in order to make an aggregate sum to be paid to another person in consideration of services to be rendered, creates a several and not a joint obligation. *Moss v. Wilson*, 40 Cal. 159.

11. The law in force at the time when a contract was made, rather than later enactments, governs its construction. *Caldwell v. Carrington*, 9 Pet. 86; *Gelpcke v. Dubuque*, 1 Wall. 175, 206; *The Miantinomi*, 3 Wall. jr. 46; *Madera v. Jones*, 1 Morr. 204; *Forgay v. Ferguson*, 6 La. Ann. 770; *O'Kelly v. Williams*, 84 N. C. 281; *Gilliland v. Phillips*, 1 S. C. 152; *Lessley v. Phipps*, 49 Miss. 790; 1 Story, Contr. (5th ed.) sect. 805; 2 Minor, Inst. 950, 954; but see *State v. Pilsbury*, 31 La. Ann. 1. For instances in which the general law has been deemed to form part of a contract, or to explain provisions otherwise doubtful, see *State v. Allis*, 18 Ark. 269; *Webster v. Rees*, 23 Iowa, 269; *Dufief v. Boykin*, 9 La. Ann. 295; *Rogers v. Allen*, 47 N. H. 529; *Clark v. Pinney*, 7 Cow. 681; *Smith v. Elliott*, 39 Tex. 201; also 2 Pars. Contr. 494, 500, 505. Parties making contracts must be considered as looking to the municipal law for remedies to enforce their rights; hence this law must be considered as entering into and forming part of the obligation (*Lessley v. Phipps*, 49 Miss. 790; but see *State v. Pilsbury*, 31 La. Ann. 1);

(b) *Lord Ellenborough, Robertson v.* 13 M. & W. 511; *Scott v. Bourdillon, French*, 4 East, 137; *Mallan v. May*, 5 B. & P. 213.

very clear that the parties used them in a sense different from their legal meaning; and the ordinary grammatical construction is to be followed, unless it is repugnant to the general context of the written instrument. (c) If the parties have used technical terms and words of art unintelligible to the ordinary reader, but having a clear, distinct, and definite meaning amongst mechanics or merchants, extrinsic evidence of such meaning may be given in aid of the interpretation of the deed, and to give the words their proper and known signification. (d) Bad spelling is of no consequence, so long as it appears with certainty [* 182] what is meant. (e) But an agreement, the * terms of which are unintelligible (f) or too vague, (g) cannot be enforced.

and this rule includes not only a statute, but its construction by the courts (*Smith v. Elliott*, 39 Tex. 201; and see 2 Pars. Contr. 569).

Where there is a conflict of applicable laws, the parties are presumed to have made the contract with reference to that statute which is most favorable to its validity and performance. *Talbot v. Merchants', &c. Transp. Co.*, 41 Iowa, 247.

12. The ordinary construction of a contract between an individual and the Government of the United States, or of a State, is the same as that applied to contracts between private parties. *Gilbert v. United States*, 1 Ct. of Cl. 28; *Sholes v. State*, 2 Chand. 182. Legislative contracts embodied in charters are to be construed favorably to the sovereign power, yet so as to effect the intention; the courts are as much bound to sustain the intention, if clear, as in case of a private contract. *Home of the Friendless v. Rouse*, 8 Wall. 430; see further, 2 Pars. Contr. 504, 513-527; 1 Story, Contr. (5th ed.), sect. 812; 1 Minor, Inst. 503, 535, 578-587.

As to receiving evidence of the circumstances attending the making a contract and of the contemporaneous or subsequent acts of the parties, see *post*, p. * 182. Covenants, how construed and whether dependent or independent, see p. * 186. Conditions, and whether precedent or subsequent, see p. * 190. Law of place in its application to construction of contracts, see pp. * 194, * 197; to their validity, see p. * 1191. General doctrine of admissibility of oral evidence in determining meaning of written contracts, see p. * 198; receiving for that purpose evidence of customs and usages, see p. * 203; or testimony of experts to explain technical words, see p. * 205. Stipulations making payment dependent on performance being satisfactory or approved by an expert, see p. * 394. Time, when of the essence of a contract, see p. * 891. Whether a contract is to be construed as allowing liquidated damages or a penalty, see p. * 1113. Treatment of mistakes in written contracts, see p. * 1181. Alternative contracts and options, see p. * 1187.

(c) *Lees v. Mosley*, 1 You. & C. 607; (f) *Guthing v. Lynn*, 2 B. & Ad. Elliott v. Turner, 2 C. B. 446. 232.

(d) *Goblett v. Beechy*, 3 Sim. 24.

(g) *Pearce v. Watts*, L. R. 20 Eq.

(e) *Hulbert v. Long*, Cro. Jac. 607; 492; *Taylor v. Portington*, 7 De G. M. Osborn's case, 10 Co. 130 a, 2 Roll. Abr. & G. 328. 147.

Evidence of Surrounding Circumstances.¹—To enable us also to arrive at the real intention of the parties, and to make a cor-

¹ In the construction of a written contract, the court must place itself in the position of the contracting parties at the time of its execution, and look at the occasion which gave rise to it, the relative positions of the parties, and their obvious designs as to the objects to be accomplished: yet not in order to create different obligations from those embodied in the instrument; for if the meaning and intention of the parties cannot be ascertained from the language employed, when thus illustrated, the contract is void for uncertainty. *Hollingsworth v. Fry*, 4 Dall. 345; *Pollard v. Maddox*, 28 Ala. 321; *Brown v. Slater*, 16 Conn. 192; *Robinson v. Stow*, 39 Ill. 568; *Thomas v. Wiggers*, 41 Ill. 470; *Karmuller v. Krotz*, 18 Iowa, 352; *Sumner v. Williams*, 8 Mass. 162, 214; *Fowle v. Bigelow*, 10 Mass. 379; *Hopkins v. Young*, 11 Mass. 302; *Pratt v. Canton Cotton Co.*, 51 Miss. 470; *Wilson v. Troup*, 2 Cow. 195, 228; *Sayre v. Peck*, 1 Barb. 464; *Hasbrook v. Pad-dock*, ib. 635; *Doolittle v. Southworth*, 3 Barb. 79; *Bellinger v. Kitts*, 6 Barb. 273; *Phelps v. Bostwick*, 22 Barb. 314; *Schenck v. Campbell*, 11 Abb. Pr. 292; *French v. Carhart*, 1 N. Y. 96; *Moore v. Meacham*, 10 N. Y. 207; *Blossom v. Griffin*, 13 N. Y. 569; *Westcott v. Thompson*, 18 N. Y. 363; *Dent v. North American Steamship Co.*, 49 N. Y. 390; *Lacy v. Green*, 84 Pa. St. 514. Thus in an action on a contract for sale of gold made between members of the Gold Exchange, the constitution and by-laws of the Exchange are admissible, and its provisions governing settlement of such sales are a part of the contract. *Peabody v. Speyers*, 56 N. Y. 230. But the rule does not admit proof of what the parties said orally while making the written contract. *Dent v. North American Steamship Co.*, 49 N. Y. 390. As to the reception of parol evidence of the circumstances attending the making of a written contract, see Section II., *post*.

Doubt as to the true interpretation of the language of a contract may often be removed by viewing the acts of the parties as having placed a construction upon it. *Chicago v. Sheldon*, 9 Wall. 50; *Wilcoxon v. Bowles*, 1 La. Ann. 230; *Parrott v. Wikoff*, ib. 232; *Williamson v. McHatton*, 16 La. Ann. 196; *Frigerio v. Stillman*, 17 La. Ann. 23; *Commercial Bank v. New Orleans*, ib. 190; *Citizens' Fire Ins., &c. Co. v. Doll*, 35 Md. 89; *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. 337; *Stapenhorst v. Wolff*, 35 N. Y. Superior Ct. 25. This rule does not mean that one party can by his subsequent conduct affect the construction to be placed on the contract (*Hepburn v. Snyder*, 3 Pa. St. 72), nor that an error of the parties as to the effect of the instrument will bind them, if the meaning is clear (*Citizens' Fire Ins., &c. Co. v. Doll*, 35 Md. 89; *Spencer v. Millisaack*, 52 Iowa, 31); but if the conduct of all the parties is consistent with one construction of the agreement, and wholly inconsistent with another, the former must be preferred, even though the latter should be the more natural (*Price v. Evans*, 26 Mo. 30). So if they have by contemporaneous writings assigned a particular meaning to a word used in their contract, that meaning will be preferred (*Conover v. Wardell*, 20 N. J. Eq. 266); and their understanding of the meanings of terms employed in it may be shown, though not their understanding of its effect (*Haddock v. Woods*, 46 Iowa, 433; and see *Pilmer v. Branch of State Bank*, 16 Iowa, 321; *Huse v. Hamblin*, 29 Iowa, 501). So where the intent is doubtful, the manner in which the contract has been, or has been attempted to be, executed by both or one of the parties, with the express or implied assent of the other, may furnish a rule for its interpretation; but regard should be had not to single acts, but to the whole execution of the agreement. *Farrar v. Rowly*, 2 La. Ann. 475; *D'Aquin v. Barbour*, 4 La. Ann. 441; *Casey v. Pennoyer*, 6 La. Ann. 776. So if they have,

rect application of the words and language of the contract to the subject-matter thereof and the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration. The law does not deny to the reader the same light and information that the writer enjoyed; he may acquaint himself with the persons and circumstances which are the subjects of the allusions and statements in the writing, and is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described. (*h*) Where a lease had been made by the plaintiff to the defendant of part of a messuage, together with a piece of ground thereunto adjoining, which piece of ground was used as a yard, and beneath the yard was a cellar occupied by a third party under a lease previously granted to him by the plaintiff, and the occupant of the cellar continued to reside in it, and to pay rent to the plaintiff, for three or four years after the latter had demised the yard to the defendant, but his lease having expired, and he having quitted the cellar, the defendant took possession of it, contending that the cellar had passed to him by the demise of the yard, the court held that parol evidence of the surrounding circumstances was admissible to show that it did not pass. (*i*)

Where by deed a customer gave a charge to his bankers upon property mentioned in a schedule as "three leasehold houses in the Coity [*sic*] held under a lease of September 25," and the

though only tacitly, adopted a usage of trade, that usage, if lawful and consistent with the language, will control. *Appleman v. Fisher*, 34 Md. 540.

Where the parties (there being no fraud or concealment or mistake or ignorance of facts) have themselves put a construction on the terms of the contract, such construction must control, as in the nature of an estoppel. *Citizens' Fire Ins., &c. Co. v. Doll*, 35 Md. 89; *Farley v. Pettes*, 5 Mo. App. 262; *Reading v. Gray*, 37 N. Y. Superior Ct. 79. But the parties can review their decision and arrive at a different construction, and if the different conclusion be acted on, it will in its turn become conclusive, unless the parties review it. *Reading v. Gray*, *supra*.

(*h*) *Shore v. Wilson*, 9 Cl. & Fin. 555, 569; *Macdonald v. Longbottom*, 29 L. J. Q. B. 256; 1 El. & Bl. 987; *Mumford v. Gething*, 29 L. J. C. P. 110; 7 C. B. N. s. 305; *Carr v. Montefiore*, 5 B. & S. 408; 33 L. J. Q. B. 256.

(*i*) *Doe v. Burt*, 1 T. R. 703; *Press v. Parker*, 10 Moore, 158; *Wigram on Evidence*, 53, 76, 83, 3rd ed.; *Doe v. Hubbard*, 20 L. J. Q. B. 67.

lease of that date only comprised one house; evidence that the customer pointed out three houses to the banker, two of which were contained in another lease, was held admissible. (*k*)

But where there is a written contract, the meaning of which as it stands is clear and unambiguous, former correspondence between the parties cannot be considered for the purpose of arriving at the intention of the parties, nor can words deleted from the document, and initialed by the parties as deleted, be used for such purpose. (*l*)

* Where the court has to find a contract in a correspondence and not in one particular agreement formally signed, the whole of the correspondence which has passed must be taken into consideration. (*m*) [*183]

Latent Ambiguity.¹ — From the admission of such evidence, and from bringing the words of the writing into contact with surrounding circumstances, a doubt sometimes arises as to the correct application of the words to the subject-matter of the contract and the objects professed to be described; this is called a LATENT AMBIGUITY, because it is not apparent upon the face of the contract, but arises from the application of the words to the objects to which they refer. “As this difficulty or ambiguity is introduced solely by the admission of extrinsic evidence of surrounding circumstances, it may be rebutted and removed by the production of further evidence of the identity of the objects described, in accordance with the ancient maxim, ‘*ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*’” (*n*) But the judgment of the court in expounding a deed must be simply declaratory of what is in the deed; it has to ascertain not what the party intended as contradistinguished from what the words express, but what is the meaning of the words he has used. (*o*) And “when the words of any written instrument are free from any ambiguity

¹ For admissibility of parol evidence to remove ambiguities, see Section II., *post*.

(*k*) *In re Boulter*, 4 Ch. D. 241.

(*l*) *Inglis v. Butterby*, 3 Ap. Cas. 552.

(*m*) *Hussey v. Horne Payne*, 4 Ap. Cas. 311.

(*n*) *Tindal, C. J., Miller v. Travers*,

1 M. & Sc. 345; Bac. Max. 23; Doe v.

Needs, 2 M. & W. 140; Doe v. Hiscocks, 5 M. & W. 368; *Raffles v. Wichelhaus*,

33 L. J. Ex. 160; 2 H. & C. 906.

(*o*) *Clayton v. Lord Nugent*, 13 L. J.

Ex. 365; 13 M. & W. 200.

in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or to the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, and common meaning of the words themselves, and evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties, is utterly inadmissible." (*p*)

Patent Ambiguity.¹—Where by an ambiguity patent on the face of the instrument the intention of the parties is left in doubt, parol evidence is inadmissible to remove it. (*q*) If a blank, for instance, has been left in a deed, or an important clause or word has been omitted by mistake, and it is doubtful what word was intended to have been used, the defect cannot be cured by extrinsic evidence of what was intended to have been inserted. (*r*)

Evidence merely explanatory of what the party has [*184] written is admissible, *but not to show what he intended to have written. (*s*) But if the ambiguity arises simply from an imperfect expression of the meaning of the party, and can be resolved by reference to the general context of the instrument when brought into contact with surrounding circumstances, the court will aid the imperfect expression in favor of the manifest intention, and will draw all such plain and reasonable inferences from the language and general context of the deed as appear to be necessary to give effect to the obvious meaning, and to carry into execution any matter or act clearly contemplated and intended to be done. (*t*) If an important word has been omitted by mistake, and it clearly appears from the general context of the instrument, and the light thrown thereon by surrounding circumstances and the nature of the transaction, what the

¹ For admissibility of parol evidence to remove ambiguities, see Section II., *post*.

(*p*) Tindal, C. J., *Shore v. Wilson*, 9 Cl. & Fin. 565, 566; *Jones v. Newman*, 1 W. Bl. 60. *omnino recedit a littera*. Bac. Tracts, fol. 47; *Miller v. Travers*, 1 M. & Sc. 347; *Clayton v. Lord Nugent*, *Shore v. Wilson*, *supra*.

(*q*) Tindal, C. J., *Sanderson v. Piper*, 7 Sc. 415; 5 Bing. N. C. 431.

(*r*) *Baylis v. Church*, 2 Atk. 239; *Hunt v. Hart*, 3 Br. C. C. 311.

(*s*) *Divinatio non interpretatio est quæ*

(*t*) *Sampson v. Easterby*, 9 B. & C. 505; 4 M. & R. 422; *Saltoun v. Houston*, 1 Bing. 433; 8 Moore, 546; *Bache v. Proctor*, 1 Doug. 383.

parties really meant and intended, the courts, in furtherance of the obvious intent, will read and construe the deed as if the word had been duly inserted. (*u*) Where the name of the obligee of a bond was omitted in the obligatory part of an instrument, and it did not consequently there appear to whom the obligor had become bound, but it afterwards appeared from the condition who he was, the bond was held good by reference to the condition, and was construed as if no such clerical error had occurred. (*x*) So where the name of the grantor had been omitted in the operative part of a grant, but it clearly appeared from another part of the deed who he was, the deed was held to be valid, and was carried into full operation. (*y*) A deed, therefore, will not in such cases be construed to be of no effect; *nam benignæ faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat.* (*z*) The words "covenant" and "condition," when used in an agreement, do not necessarily mean a covenant under seal, or a condition in the strict legal sense of the word, but may, in order to effectuate the intention of the parties, be construed to mean contract or stipulation. (*a*)

Figures and Words at Length.¹—The import and meaning of words at length cannot be contradicted or altered by figures. Where the figures and the words of a bill of exchange or promissory note, for example, disagree, the courts will give force to the words at length in preference to the figures, "because a man is more apt *to commit an error with his pen [*185] in writing a figure than he is in writing a word." (*b*)

Repugnant and Void Limitations of Liability.²—If a man covenants in his own name for the performance of some particular act or duty, and then seeks by proviso to relieve himself from ALL LIABILITY upon the covenant, the proviso will be rejected

¹ Where in a certificate of deposit the amount stated in the body of the certificate is different from that in figures in the margin the former will be taken to be the sum deposited. *Payne v. Clark*, 19 Mo. 152.

² See *ante*, p. *181, American note, ¶ 5.

(*u*) *Coles v. Hulme*, 8 B. & C. 568; (*z*) *Platt on Covenant*, c. 2; *Bac. Phipps v. Tanner*, 5 C. & P. 488; *Jarvis Abr. Covenant*; *Fazakerly v. M'Knight*, 6 Ell. & Bl. 805; 26 L. J. Q. B. 30.

(*x*) *Langdon v. Goole*, 3 Lev. 21.

(*a*) *Hayne v. Cummings*, 16 C. B.

(*y*) *Say (Lord) and Sele's case*, 10 N. s. 421.

(*b*) *Sanderson v. Piper*, 7 Sc. 415.

as being repugnant to the covenant. (c) If two persons make a grant by deed, and it is provided that the deed shall not charge one of the grantors, the proviso is void; for it restrains all the effect of the grant as against him. (d) If a company authorizes its agent to issue bills of exchange with restricted liability as regards the shareholders, such restriction of liability is repugnant and void. (e) Where by indenture the defendants covenanted for themselves and their successors, churchwardens, &c., with the plaintiff, that they, the said churchwardens, &c., and their successors, would pay to the plaintiff a certain sum of money by instalments, but it was provided that nothing contained in the said indenture should be deemed or construed to be any personal covenant of or obligation upon the defendants, or in anywise personally affect them, their goods, effects, or estates, but should be binding upon the churchwardens and overseers of the poor of the said parish and their successors for the time being, it was held that, as the defendants could not covenant so as to bind their successors, the covenant was their own personal covenant, and that the proviso, being in direct contradiction to the covenant, and utterly inconsistent with any personal liability of any kind whatever upon it, must be rejected as repugnant. (f) But a proviso limiting the liability without destroying it is valid. (g)

Limitation of Liability to a Particular Fund. — But when a covenant has been entered into for the payment of money, a proviso by the same deed exonerating the covenantor from all liability upon the covenant is not nugatory if a particular fund is charged with the payment of the money. In the case of covenants to pay an annuity, if the land of the covenantor is charged with the payment, a proviso exonerating the person and personalty of the grantor is good; and Lord Coke, in commenting upon sect. 220, in Littleton, says: "It appeareth that when in a general grant the law doth give two remedies, the grantor may provide that the grantee shall not use one of them, and so leave the party to the other. But where the grantee hath [*186] but one remedy, there that *remedy cannot be barred

(c) Jenk. Cent. 96, pl. 86.

(d) Bro. Abr. *Conditions*, pl. 238.(e) State Fire Ins. Co., *in re*, 32 L. J. Ch. 300.(f) *Furnivall v. Coombs*, 6 Sc. N. R.

522; 5 M. & G. 736.

(g) *Williams v. Hathaway*, 6 Ch. D. 544.

by any proviso; for such a proviso would be repugnant to the grant." Consequently a proviso restricting the liability, good at the beginning, may become repugnant and void. As if a man by deed grants a rent for life issuing out of his land, with a proviso that it shall not charge his person, this is a good proviso; yet if the rent is in arrear and the grantee dies, his executors shall charge the person of the grantor in an action of debt; for otherwise they would be without remedy; and therefore the proviso is now become repugnant, and by consequence void. (*h*) Covenants to pay out of a particular fund do not of necessity imply that the payment is not to be made, unless the fund is raised, and do not, therefore, make the contract conditional and contingent on the realization of the fund. Such a covenant is an absolute covenant to pay the money, unless there is an express limitation of the liability. (*i*)

In the case of simple contracts, however, where the party has looked to the anticipated realization of funds by projectors of a particular undertaking, and not to the personal liability of the parties with whom he has contracted, his claim is confined to the fund, and he cannot enforce payment from individuals; and if the project miscarries, and funds are not realized, he has no claim upon anybody or for anything. When it is not said at whose option one of two alternatives is to take place, the rule of law is that the option is in the party who is to do the first act. (*k*) Thus a loan for nine or six months gives the borrower the option. (*l*) A lease for seven, fourteen, or twenty-one years without saying at whose option, is at the option of the lessee. (*m*)

What Words amount to a Covenant.¹—No precise form of words is necessary to constitute a covenant. Whatever words

¹ Covenants, how they are construed, and particularly whether they are dependent or independent, see U. S. Dig. tit. *Contracts*, sec. 1046; ib. tit. *Covenants*, I.; Council Bluffs Iron Works v. Cuppey, 41 Iowa, 104; Hummel v. Siddal, 11 Phila. 308; Adrain v. Lane, 13 S. C. 183; Waldron v. Brazil, &c. Coal Co., 7 Ill. App. 542; Root v. Wright, 84 N. Y. 72; Green v. Cullen, 86 N. Y. 246;

(*h*) Sir Anthony Mildmay's case, 6 Co. 41 b.

(*k*) Price v. Nixon, 5 Taunt. 338.

(*i*) Bain v. Kirk, 18 L. J. Q. B. 83; Pilbrow v. Pilbrow's Co., 5 C. B. 472; Sunderland Marine Ins. Co. v. Kearney, 20 L. J. Q. B. 417.

(*l*) Reed v. Kilburn Co-operative Soc., L. R. 10 Q. B. 265.

(*m*) Dunn v. Spurrier, 3 B. & P. 399.

are used by a party to a deed, if he intends that they shall operate as a covenant, he will be held liable. (*n*) The words in a contract under seal, "I will be answerable," or "I will be accountable," to A for £10, or "I am content to give A £10 at Michaelmas," amount to a covenant to pay the money; (*o*) and words used in the future tense, unconnected with precedent words of agreement, will in themselves be sufficient to constitute an express covenant. (*p*) An action of covenant will lie on general words of contract and agreement contained in a deed, [*187] although the parties profess not to contract "by way of covenant," as where they "resolved and agreed, and did, by way of declaration and not of covenant, spontaneously and fully agree;" and Lord Eldon said it was nonsense to talk of agreeing and declaring (under seal) without covenanting. (*q*) Where a lessee covenanted that he would plough, sow, manure, and cultivate the demised premises, "except the rabbit-warren and sheep-walk," it was held that, as the parties clearly meant by the exception that neither the warren nor the sheep-walk should be ploughed, the exception ought to be construed as a covenant that it should not be done, and that an action of covenant consequently was maintainable for the doing of it. (*r*) So when it was agreed that a lessee should have "*conveniens lignum non succidendo arbores*," it was held that the lessor might have an action of covenant against him on these words for cutting down the trees. (*s*) Words of recital in a deed will constitute

Sherman v. Kane, ib. 57. Article on Covenants of Warranty, 6 South. L. Rev. 719.

The various covenants in a contract will be deemed dependent, unless the intention of the parties, as gathered from the whole instrument, clearly is to make independent covenants; and the order of the covenants in the paper is not material. *Hamilton v. Thrall*, 7 Neb. 210.

(*n*) *Per* Id. Cairns, L. J., *Isaacson v. Harwood*, L. R. 3 Ch. 225; 37 L. J. Ch. 209.

(*o*) 3 Leon. 119, pl. 169; *Brice v. Carre*, 1 Lev. 47; 1 Keb. 155.

(*p*) *Bret v. Cumberland*, Cro. Jac. 399.

(*q*) *Ellison v. Bignold*, 2 J. & W. 510; *Wood v. Copper Miner's Co.*, 7 C. B. 906; *Sampson v. Easterby*, 9 B. & C. 514; *Courtney v. Taylor*, 6 M. & G. 851;

7 Sc. N. R. 765; *Williams v. Burrell*, 1 C. B. 429; *James v. Cochrane*, 21 L. J. Ex. 229; *Mason v. Cole*, 4 Exch. 379; *Farrall v. Hilditch*, 5 C. B. N. S. 853; 28 L. J. C. P. 221; *Marryat v. Marryat*, 28 Bea. 224; 29 L. J. Ch. 665; *Jackson v. North-Eastern Ry.*, 7 Ch. D. 573.

(*r*) *Duke of St. Albans v. Ellis*, 16 East, 532.

(*s*) March 9, pl. 22; Dy. 19, b. pl. (115); *Stevinson's case*, 1 Leon. 324.

an agreement between the parties upon which an action of covenant may be maintained, where it appears to be the intention of the parties that they should do so. (*t*) Thus, where a termor for ninety-nine years, if three lives should so long continue, recited his interest, and that one life was in being, and assigned his term, it was adjudged that this recital amounted to a covenant that the life continued. (*u*) So the recital in a deed of a previous agreement to do a certain act amounts to a covenant in the deed for the performance of it; for the recital operates as a solemn confirmation of the "agreement and intent precedent." (*x*) But a recital does not necessarily imply a covenant; and whether it does so or not in each case depends on what is to be collected as the intention of the parties from the whole instrument. (*y*) Thus where a marriage settlement contained a recital of an agreement that after-acquired property of the wife should be settled, and the corresponding operative part was a covenant by the husband alone, it was held that the covenant was not controlled by the recital, and was not binding on the wife. (*z*) When there is an acceptance of a trusteeship under seal, that does not amount to a covenant to perform the duties of the office. (*a*)

Words of Proviso and Condition may be construed as an * Express Covenant, when such a construction is [*188] necessary to give effect to the apparent intention of the parties. (*b*) Thus, where a conveyance was made by the plaintiff of an incorporeal right to the defendant, provided that out of the first profits the defendant should pay the plaintiff £500, it was held that an action of covenant might be maintained on these words of proviso for the non-payment of the money. (*c*) Where a lease executed by the lessor and lessee contained a covenant on the part of the lessee to maintain and repair a farmhouse and premises, "the said farmhouse and buildings being previously put into repair" by the lessor, it was held that these words amounted to an absolute covenant on the part of the lessor to

(*t*) *Gawdy, J., Severn & Clarke's case*, 1 Leon. 122; *Aspdin v. Austin*, 5 Q. B. 683; *Lay v. Mottram*, 19 C. B. N. S. 479.

(*u*) *Holles v. Carr*, 3 Swanst. 648; 2 Freem. 3.

(*x*) *Barfoot v. Freswell*, 3 Keb. 465.

(*y*) *Ivens v. Elwes*, 24 L. J. Ch. 249.

(*z*) *Young v. Smith*, L. R. 1 Eq. 180.

(*a*) *Holland v. Holland*, L. R. 4 Ch. 449; 38 L. J. Ch. 398.

(*b*) *Brooks v. Drysdale*, 3 C. P. D. 52.

(*c*) *Clapham v. Moyl*, 1 Keb. 842,

897.

put the house into repair, and not merely to a qualification of the covenant of the lessee. (*d*) So where a lease was granted on condition that the lessee should keep and leave the demised premises at the end of the term in as good plight as he found them, or that he should not exercise thereon a particular trade or business, (*e*) it was held that an action of covenant would lie for a breach of this condition. Where, however, the proviso or condition is by way of qualification of the covenant, or defeasance of the deed or of the estate and interest thereby created, and not in the nature of an agreement, as if a lease be granted, provided and on condition that the lessee collect and pay the rents of the other houses of the lessor, an action of covenant is not maintainable. If a lessee for years covenant to repair, "provided always and it is agreed that the lessor shall find great timber," &c., a covenant is created on the part of the lessor to find the timber by reason of the word "agreed;" but if the lessee had covenanted to repair, provided the lessor found the timber, without the word "agreed," the proviso would not have amounted to a covenant on the part of the lessor, but to a qualification only of the covenant of the lessee. (*f*)

Covenants by Implication of Law.¹—Where a lessee covenanted that he would at all times during the continuance of his lease fold his flock of sheep which he should keep upon the demised premises upon such parts where the same had been usually folded, it was held that this amounted to a covenant to keep a flock of sheep upon the premises, and that it would consequently be no answer to an action upon the covenant for the defendant to say that he kept no sheep, and therefore [*189] had none to fold. (*g*) And where a *landlord demised certain limestone quarries and limekilns to a tenant, who covenanted, amongst other things, that he would, at all times and seasons of burning lime, supply the lessor and his

¹ See *Crouch v. Fowle*, 9 N. H. 219, 32 Am. Dec. 350; and note by A. C. Freeman, *ib.* 353.

(*d*) *Connock v. Jones*, 3 Exch. 233; *Geery v. Reason*, Cro. Car. 128; *Simpson v. Titterell*, Cro. Eliz. 242; *Wolveridge v. Steward*, 3 M. & Sc. 566.

(*e*) *Hodson v. Coppard*, 30 L. J. Ch. 20; 29 Beav. 4.

(*g*) *Webb v. Plummer*, 2 B. & Ald.

(*f*) 1 Rolle Abr. 518; Bac. Abr. Cov. 749.

tenants with lime at a stipulated price, for the improvement of their lands and the repair of their houses, it was held that this amounted to a covenant to burn lime at such seasons, and that it was no defence to plead that there was no lime burned on the premises out of which the lessor could be supplied. (*h*) If two persons covenant together that it shall be lawful for the one to hold possession of the other's property for a certain time, the law infers therefrom an agreement that he shall not detain it for a longer time, but shall then give it up to the owner; if he detains it beyond that time it is a breach of covenant. (*i*) Where a debt is assigned with the usual power of attorney to sue in the assignor's name, there is an implied covenant by the assignor not to thwart the remedy of the assignee against such debtor. (*k*)

Bonds and Obligations. — No precise form of words is necessary to create a bond or obligation. Any memorandum in writing under seal, acknowledging a debt or denoting the intention of the party to bind himself for the payment of a sum of money, will oblige him as effectually as the most formal words he can make use of — such, for example, as “I, A B, have borrowed £10 of C D,” or “Memorandum that A owes B £10,” or “I have agreed to pay J S £19;” for although the words “*teneri et firmiter obligari*” are generally put into every common bond, yet when any other words purport the same effect and the same sense in writing, the law will construe them to have like efficacy. Every word which proves a man to be a debtor, if it be under seal, will charge him with the payment of the money. (*l*) If no time is limited in a bond for the payment of money acknowledged to be due, such money is due immediately, and payable on demand. If it be for the performance of an act on the 29th of February next following, and the next February has only twenty-eight days, it has been said that the party is not bound to do the act until the next leap-year, when February has twenty-nine days. (*m*)

(*h*) Earl Shrewsbury v. Gould, ib. 487.

(*i*) Randall v. Lynch, 12 East, 182.

(*k*) Gerard v. Lewis, 36 L. J. C. P. 173; L. R. 2 C. P. 305.

(*l*) Core's case, Dyer, 22 b; Bedow's

case, 1 Leon. 25; Bac. Abr. p. 804; Sawyer v. Mawgridge, 11 Mod. 218; 1 Rolle Abr. 146; Watson v. Snead, Vent. 238.

(*m*) 1 Leon. 101, pl. 132.

Dependent and Independent Covenants.—“There are,” observes Lord Mansfield, “three kinds of covenants: first, such as are called mutual and independent, where either party may recover damages from the other for the injury he may [*190] have received * by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff; secondly, there are covenants which are conditional and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant; there is also a third sort of covenants, which are mutual conditions to be performed at the same time, and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act.” (n)

Conditions Precedent.¹—Representations and stipulations in a

¹ Conditions, how they are construed and enforced, and particularly whether they are precedent or subsequent, see U. S. Dig. tit. *Contracts*, sect. 991; *Thompson v. Houston*, 31 Tex. 610; *Kaahle v. Sneed*, 59 Pa. St. 388; *Russell v. McCormick*, 45 Ala. 587; *Henry County v. Winnebago, &c. Drainage Co.*, 52 Ill. 454; *Clough v. Baker*, 48 N. H. 254; *Richards v. Schlegelmich*, 65 N. C. 150; *Breaux v. Lauve*, 24 La. Ann. 179; *Arnold v. River R. R. Construction Co.*, 35 Iowa, 99; *Turner v. Baker*, 30 Ark. 186; *Chicago, &c. R. R. Co. v. Chicago Coal Co.*, 79 Ill. 121; *Booth v. Cleveland Rolling Mill Co.*, 74 N. Y. 15; *Ramsay v. Edgefield, &c. R. R. Co.*, 3 Tenn. Ch. 170; *Stockton Savings, &c. Soc. v. Hildreth*, 53 Cal. 721; *Waldron v. Brazil, &c. Coal Co.*, 7 Ill. App. 542; *Sennett v. Shehan*, 37 Minn. 328; *Front Street, &c. R. R. Co. v. Butler*, 50 Cal. 574.

“Provided that” and “provided also” do not always constitute a condition. Whether there is a condition, and whether one is precedent or subsequent, is to be determined from the intent of the parties as indicated from the whole language used, and from the nature of the act required. *Schwoerer v. Boylston Market Assoc.*, 99 Mass. 285.

Courts are disinclined to construe the stipulations in a contract to do certain things within a given time in consideration of the payment of money by the other party, as conditions precedent, unless compelled to do so by the express language of the contract. *Front Street, &c. R. R. Co. v. Butler*, 50 Cal. 574; *Hollis v. Chapman*, 36 Tex. 1.

Where the contract is an entirety, and there are in it no means of apportion-

(n) *Kingston v. Preston*, cited 2 *Curling*, 3 Sc. 754; *Thorpe v. Thorpe*, 1 *Doug.* 689; *Tindal, C. J., Stavers v. Salk*, 171; *Peeters v. Opie*, 2 *Saund.* 350.

contract as to something future to be done often constitute conditions precedent to be performed by one party before any liability attaches to the other. Whether particular stipulations are to be conditions precedent or not depends upon the intention of the parties, to be gathered from the language of the particular instrument. (*o*) Where a tenant covenanted to repair, the landlord, "finding, allowing, and assigning timber sufficient for such reparations to be cut and carried by the lessee," it was held that the finding and assigning the timber by the lessor was a condition precedent to the liability of the lessee to repair; (*p*) but if the landlord is ready and willing, and offers to find and allow the timber, there is a sufficient performance of the condition on his part. (*q*) And if the covenant has annexed to it a mere license to take timber for the purpose of reparation, the license does not amount to a qualification of the covenant, so as to exonerate the tenant from his liability to repair in case there should happen to be no timber on the demised premises fit for reparation. (*r*) Whenever it appears to have been the intention of the parties that performance of one stipulation should not be a condition precedent to the performance of another, effect

ment, and nothing can be found *aliunde* to establish an apportionment or to show the relative or absolute values of the several conditions, no action can be maintained to recover the consideration, if unpaid, nor upon a *quantum meruit*, until all the conditions are performed; and if the consideration has been paid in advance, and only some of the conditions are performed, the entire consideration can be recovered back; yet to this conclusion in any given case, the law reluctantly comes, and only when it is perfectly clear that by no construction or evidence can there be any apportionment or determination of values. *Missouri, &c. R. R. Co. v. Fort Scott*, 15 Kan. 435.

Generally, if a condition precedent has not been complied with, no recovery can be had on a *quantum meruit*; otherwise, where the defendant by completing the contracts himself puts it out of the power of the plaintiff to do so. *Escott v. White*, 10 Bush, 169; see *Darland v. Greenwood*, 1 McCrary C. Ct. 337; *Allen v. Pennell*, 51 Iowa, 537; *Hollis v. Chapman*, 36 Tex. 1.

Where the act of a party for whose benefit conditions precedent attach is relied on as an excuse for non-performance, it must be the proximate and not the remote cause of the failure to perform, and be of such a character as to render performance impossible, or to induce the belief that it was waived, or that if attempted it would not be accepted. *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538.

- (*o*) *Havelock v. Geddes*, 10 East, 555; (*q*) *Martyn v. Clue*, 18 Q. B. 681.
Seegar v. Duthie, 8 C. B. N. s. 45, 72; (*r*) *Dean & Chapter of Bristol v. Jones*, 28 L. J. Q. B. 201; 1 El. & El.
 30 L. J. C. P. 65.
 (*p*) *Thomas v. Cadwallader*, Willes, 484.
 496; and see *Neale v. Ratcliffe*, 15 Q. B.

will be given to such intention; (s) but where the intention is to rely on a previous performance, and not on the remedy for non-performance, performance is a condition precedent. (t)

Where a landlord granted all the coal lying and being [*191] * within and under certain premises, and the grantee covenanted to pay so much for every acre of coal found within or under the said premises, and to pay £40 a year whether the whole of an acre should be gotten or not, it was held that the *finding* of coal was not a condition precedent to the landlord's right to receive the £40 a year. (u)

The word "upon" may mean *before* the act done to which it relates, or *simultaneously with* the act done, or *after* the act done, according as reason and good sense require the interpretation with reference to the context and the subject-matter of the instrument. (x)

Where a singer engaged to be present for rehearsal six days before appearance, but did not, it was held that this was not a breach of a condition precedent, (y) as it did not go to the root of the contract; but where the plaintiff was, through illness, quite unfit to undertake the earlier performances promised, it was held that the defendant was excused from his part of the contract, as the plaintiff's inability to perform did go to the root of the matter. (z)

Waiver of Conditions Precedent. — Where a stipulation in the nature of a condition precedent has been partially performed, it ceases to be available as a condition, and becomes a stipulation by way of agreement, for the breach of which compensation must be sought in damages. (α)

Independent Covenants and Promises.¹ — "If there be a day set for the payment of the money, or for the doing of the thing which one promises and agrees to do for another thing, and that

¹ See *ante*, p. *186, American note.

(s) *Christie v. Borelly*, 7 C. B. N. s. 561; 29 L. J. C. P. 153; *Dodd v. Ponsford*, 6 C. B. N. s. 324. (y) *Bertini v. Gye*, L. R. 1 Q. B. D. 183.

(t) *Roberts v. Brett*, 18 C. B. 573; 6 C. B. N. s. 611; 23 L. J. C. P. 323; 34 *ib.* 241; 11 H. L. Cas. 337. (z) *Poussard v. Spiers & Pond*, 1 Q. B. D. 410.

(u) *Jowett v. Spencer*, 1 Exch. 649. (α) *Behn v. Burness*, 3 B. & S. 753; 32 L. J. Q. B. 204; *Pust v. Dowie*, 32 L. J. Q. B. 179; 5 B. & S. 20, 33. (v) *Reg. v. Humphrey*, 10 Ad. & E. 335, 369.

day is to happen, or may happen, before the other thing can be performed, an action may be brought for the money before the thing be done; for it appears that the party relied upon his remedy upon the contract," and not upon a previous or concurrent performance. (b) If in a contract of hiring and service it is stipulated that the hire shall be paid before the time appointed for the rendering of the service, there the servant may bring an action for the money before the service has been performed. (c) So if there are mutual covenants for the sale and purchase of an estate, and a fixed day is appointed for the payment of the purchase-money, and another and later day for the conveyance of the property, the money must be paid on the day appointed, although the purchaser has not got * the [* 192] estate. (d) Where a purchaser agreed to pay for goods, not on, but after, delivery, it was held that actual delivery was precedent to the right of the vendor to sue for the price, unless the defendant had refused to receive the goods, and by his own act had prevented the performance of the contract by the plaintiff. (e) So where a vendor agreed to deliver forthwith fifty tons of iron for the price of £9 per ton, the price to be paid in cash in fourteen days, it was held that the delivery of the iron was a condition precedent to the payment of the price, and the vendor not having delivered the goods within the fourteen days, that the defendant was discharged from liability. (f) If a deed purports and professes to grant and convey an interest, the covenants of the grantee immediately relating to that interest, and founded on the grant thereof, are conditional and qualified, so that the liability of the grantee upon them is dependent upon the interest, or some portion thereof, being actually transmitted to him. But this is not the case with respect to the covenants of the grantor of that interest; his covenants are independent and unconditional; and he is consequently liable upon them,

(b) *Holt, C. J., Thorp v. Thorp*, 12 Mod. 461; *Parker v. Rawlins*, 12 Moore, 529; 4 Bing. 280; *Judson v. Bowden*, 1 Exch. 166; 17 L. J. Ex. 172; *Terry v. Duntze*, 2 H. Bl. 389; *Cutter v. Bower*, 11 Q. B. 973; *Dicker v. Jackson*, 6 C. B. 114.

(c) *Pool's case*, 1 Wms. Saund. 320 b.

(d) *Sibthorp v. Brunel*, 3 Exch. 826; *Yates v. Gardiner*, 20 L. J. Ex. 327; *Pordage v. Cole*, 1 Wms. Saund. 319 h; *Mattock v. Kinglake*, 10 Ad. & E. 50; *Spiller v. Westlake*, 2 B. & Ad. 157; *Walker v. Harris*, 1 Anstr. 245.

(e) *Ripley v. M'Clure*, 4 Exch. 357.

(f) *Staunton v. Wood*, 16 Q. B. 638.

whether the interest he professes to convey does or does not pass. (*g*)

Covenants founded on a Mutuality of Obligation and Liability must be mutually binding upon the parties to them. If, therefore, one of several parties to a deed *inter partes* founded on mutual covenants neglects to execute the deed, the contract is not binding on the others who have executed it. (*h*) And if a deed of covenant *inter partes*, originally binding upon all, becomes ineffectual and inoperative as to one by matter *ex post facto*, such as bankruptcy, the deed is wholly void. (*i*) Where there are mutual and dependent covenants on the part of directors of companies and subscribers to the capital thereof, and the directors do not execute the deed, the subscribers will not be responsible upon their covenants. (*k*) But where the covenant is not founded upon some interest to be created by deed, or upon a mutuality of obligation and liability, the general rule of law is that where a party has a covenant made to him, and he in return is to make a covenant, he may sue on the covenant made to him, even though he himself has not executed the deed. Thus, where a mortgage deed containing cross covenants between [*193] mortgagee and mortgagor was executed by the mortgagee alone, it was held that the latter was nevertheless liable upon his covenants. (*l*)

Implied Stipulations. — If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he will do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative. (*m*) But where two parties mutually agree for their mutual benefit that one shall be sole agent for the other to sell goods in a particular town, there is no implied condition that the business itself shall be continued. (*n*)

(*g*) *Walter v. Dean, &c. of Norwich*, 1 Brownl. & Goldes. 21; *Owen*, 136; *Jones v. King*, 4 M. & S. 188; *Northcott v. Underhill*, 1 Raym. 388.

(*h*) *Antram v. Chace*, 15 East, 212; *Marsh v. Wood*, 9 B. & C. 665.

(*i*) *Kearsey v. Carstairs*, 2 B. & Ad. 726.

(*k*) *In re Dover, Hastings, &c.*, 18 Jur. 52.

(*l*) *Morgan v. Pike*, 14 C. B. 473.

(*m*) *Stirling v. Maitland*, 5 B. & S. 840; 34 L. J. Q. B. 1; *McIntyre v. Belcher*, 14 C. B. N. S. 654; 32 L. J. C. P. 254.

(*n*) *Rhodes v. Forwood*, 1 Ap. Cas. 256.

Usual Covenants.—It is a very frequent stipulation in an agreement for a lease that the lease shall contain all “usual covenants,” and the courts have had frequently to decide what is or is not a “usual covenant.” Thus it has been held that covenants to pay rent, (*o*) to repair, (*p*) for quiet enjoyment, (*q*) and to pay rates and taxes when net rent is fixed, (*r*) are usual covenants. And, upon the other hand, that covenants not to underlet or assign, (*s*) not to carry on a particular trade, (*t*) are not “usual.” In mining leases it has been held that a proviso for re-entry upon a forfeiture by bankruptcy or assignment, (*u*) and a covenant that the lease should determine when the mines could not be worked to a profit, (*x*) are not “usual.”

Computation of Time.¹—Whenever a person is allowed a specified number of months for the delivery of an abstract of title, the payment of a sum of money, or the performance of any particular act or duty, the month is understood to be a calendar and not a lunar month, unless it appears from the general context of the contract that a lunar month was intended. (*y*) When time is to be computed from a particular day, or from the day of an act being done or the happening of a particular event, such day is to be excluded from the computation; for our law rejects fractions of a day, and an act done in the compass of it is not referable to one portion of the day more than another, so that the act is not considered to be passed and done with until the day has passed. * When, therefore, goods were sold [*194] on the 5th October to be paid for in two months, it was held that the day on which the contract was made was to be excluded from the computation, and that an action for the price

¹ As to modification of contracts in respect to date and time, see Section II. *post.*

(*o*) *Taylor v. Horde*, 1 Burr. 60.

(*p*) *Kendall v. Hill*, 6 Jur. N. s. 968.

(*q*) *Davidson's Precedents*, vol. 5, pt. 1, p. 51, 3d ed.

(*r*) *Bennett v. Womack*, 7 B. & C. 627.

(*s*) *Smith and Soden's Landlord and Tenant*, 2d ed. p. 87; *Hampshire v. Wickens*, 7 Ch. D. 555; *Buckland v. Papillon*, L. R. 2 Ch. 67.

(*t*) *Proper v. Parker*, 3 Myl. & K.

280; and see *Van v. Corpe*, 3 Myl. & K. 269; *Doe d. Marquis of Bute v. Guest*, 15 M. & W. 160.

(*u*) *Hodgkinson v. Crowe*, L. R. 10 Ch. 622.

(*x*) *Strelly v. Pearson*, 15 Ch. D. 113.

(*y*) *Lang v. Gale*, 1 M. & S. 111; *Jolly v. Young*, 1 Esp. 186; *Corkell v. Gray*, 6 Moore, 486; 3 B. & B. 186.

could not be maintained until after the expiration of the 5th of December. (z)

In considering whether, upon a contract to do an act or enter into an engagement at or for a definite time from a certain date, the time is to be reckoned exclusively or inclusively of the last day, it is impossible to lay down any fixed rule; each case must depend on its own circumstances and subject-matter. (a) But in general the last day is to be included. Thus, where a lease was granted for twenty-one years from the 25th of March in a particular year, the lease was held to continue until the end of the 25th of March of the last year. (b) So where a bankrupt was to be protected from the 16th until the 29th of July, it was held that the whole of the 29th was included. (c) So where goods were sold to be paid for in two months' time, it was held that the first day, the day of the sale, was excluded, and the last day included. (d) And where a patent contained a proviso that the specification was to be filed within one month's time next after the date thereof, the day on which the letters patent were granted was held to be excluded. (e) Again, where a security not to do a particular thing was to be given within six months from a testator's death, the last day of the six months was held to be included. (f) And where by a policy of insurance goods were insured against fire from the 14th of February until the 14th of August, it was held that the whole of the latter day was within the protection of the policy. (g)

Of the Interpretation of Contracts made in one Country and enforced in Another.¹—All contracts made in one country con-

¹ As to the doctrine of the law of place in its application to contracts, the principles for reconciling the conflict of laws, and the question whether the law of the jurisdiction of the place where the contract is made, of that where it is to be performed, or of that where it is put in suit, should govern the construction, see 2 Pars. Contr. 567; Story, Conf. of L. 265; 2 Kent, Com. 575-588. Law of place as to interest, see *Western Transp. Co. v. Kilderhouse*, 87 N. Y. 430.

(z) *Webb v. Fairmaner*, 3 M. & W. 473; *Young v. Higgon*, 6 ib. 49; *Mercantile Marine Insurance Co. v. Titherington*, 34 L. J. Q. B. 11.

(a) *Pugh v. Duke of Leeds*, 2 Cowp. 714.

(b) *Ackland v. Lutley*, 9 Ad. & E. 879.

(c) *Bellhouse v. Mellor*, 4 H. & N. 116; 28 L. J. Ex. 141.

(d) *Webb v. Fairmaner*, 3 M. & W. 473.

(e) *Watson v. Pears*, 2 Campb. 294.

(f) *Lester v. Garland*, 15 Ves. 248.

(g) *Isaacs v. The Royal Insurance Co.*, L. R. 5 Ex. 296; 39 L. J. Ex. 189.

cerning land and houses and immovable property situate in another country must be interpreted according to the law of the

The general doctrine is that if a contract binds parties to performance within any particular jurisdiction, the law and usage of that jurisdiction are to be followed in construing it; if it does not, then the law and usage of the place where it is made govern. *Thompson v. Ketcham*, 8 Johns. 189; *Jacks v. Nichols*, 5 N. Y. 178; *Bowen v. Newell*, 13 N. Y. 290; *Curtis v. Leavitt*, 15 N. Y. 9; *Everett v. Vendryes*, 19 N. Y. 436; *Cutler v. Wright*, 22 N. Y. 472; *Story*, *Confl. L.*, sects. 270, 280, 282. See further, *U. S. Dig. tit. Contracts*, sect. 2235; applications of the general doctrine to question of form, execution, &c., *ib.* sect. 2244; to questions of construction and effect, *ib.* sect. 2255; of validity, *ib.* sect. 2268; of performance, *ib.* sect. 2283; peculiar to negotiable instruments, *ib.* sect. 2288; or to remedies, *ib.* sect. 2295.

Recent cases are: Matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made; matters connected with its performance are regulated by the law of the place of performance; matters respecting the remedy depend upon the law of the place where the suit is brought. *Scudder v. Union Nat. Bank*, 91 U. S. 406. Compare *Payson v. Withers*, 5 Biss. 269; *Laird v. Hodges*, 26 Ark. 356; *Partee v. Silliman*, 44 Miss. 272; *Williams v. Carr*, 80 N. C. 294; *Faulkner v. Hart*, 44 N. Y. Superior Ct. 471; *Denis v. Faulkner*, 22 Kan. 89.

The question, what law governs a contract, depends, theoretically, at least, upon the intention of the contracting parties. An agreement to perform an act at a particular place is made with reference to the law of that place, and an agreement to perform an act without designating a place for performance, is presumed to be made with reference to the law of the place at which the agreement was made; and these presumptions are conclusive. *Hyatt v. Bank of Kentucky*, 8 Bush, 193.

One State cannot dictate to another how to construe a contract sought to be enforced within its limits; a reasonable limitation of the rule of comity is that no community shall suffer prejudice by its comity. *Lewis v. Woodfolk*, 58 Tenn. 25. Compare *Union, &c. Exp. Co. v. Erie Ry. Co.*, 37 N. J. L. 23; *Mineral Point R. R. Co. v. Barron*, 83 Ill. 365; *Cubbedge v. Napier*, 62 Ala. 518.

It is only in ascertaining the rights and liabilities of the parties that the law of the place where the contract is made governs; the remedy is governed by the law of the former. If the liability of the party, ascertained by the law of the State where it was made, is equitable, it can be enforced, where legal and equitable remedies are distinct, only in equity, notwithstanding it might, in the State where made, have been enforced at law. *Burchard v. Dunbar*, 82 Ill. 450.

The laws which subsist at the time and place of the making of a contract, if it is to be there performed, enter into and form a part of the contract; and this is so whether such law affects its validity, construction, enforcement, or discharge. *Roberts v. Cocke*, 28 Gratt. 207; *s. p.* *Champion v. Wilson*, 64 Ga. 184.

Where a contract is by its terms to be performed in a State other than that in which it is made, the law of the State in which it is to be performed must govern its construction and effect. *Dickinson v. Edwards*, 58 How. Pr. 24; *Waldron v. Richings*, 9 Abb. Pr. n. s. 359; *Dunn v. Welsh*, 62 Ga. 241; *Downer v. Chesebrough*, 36 Conn. 39.

A contract made in one State to be fulfilled there, subject to ratification in another State, is, when ratified, to be interpreted by the laws of the first State. *Golson v. Ebert*, 52 Mo. 260. To nearly same effect, *Hildreth v. Shepard*, 65 Barb. 265.

Where a contract is made in one State to be partly performed in that State and

country in which the property is situate, the "*lex loci rei sitæ*," and not by the "*lex loci contractus*," or the law of the country

partly in others, the construction of the contract as a whole is governed by the law of the place where it is made; the law of the place of performance does not apply. *Morgan v. New Orleans, &c. R. R. Co.*, 2 Woods, 244.

Although a contract made in another State for the loan of money, is governed by the laws of the State where made, yet a conveyance of lands to secure the payment of the loan, though executed in another State, is determined by the laws of the State where the lands lie. *Klinck v. Price*, 4 W. Va. 4; *Morgan v. New Orleans, &c. R. R. Co.*, 2 Woods, 244. Compare *Oregon, &c. Trust Co., v. Rathbun*, 5 Sawyer, 32; *Cantu v. Bennett*, 39 Tex. 303; *Sands v. Smith*, 1 Neb. 108; *Mills v. Wilson*, 88 Pa. St. 118; *Richardson v. Draper*, 23 Hun, 188; *Dial v. Gary*, 14 S. C. 573.

In determining whether a conveyance of real estate contains a covenant that runs with the land, the *lex rei sitæ* governs. *Fisher v. Parry*, 68 Ind. 465.

The interest to be paid under a contract is, as a general rule, to be determined by the law of the place in which the parties in good faith intended it to be performed. *Campbell v. Nichols*, 33 N. J. L. 81.

As to a contract in relation to personal property situated at the date thereof in a foreign jurisdiction, the *lex loci* governs; thus, a contract made in Michigan for the purchase of a piano, construed by the courts of that State to be a mere bailment giving the buyer no right to mortgage it, will be so construed by the courts of Illinois upon his removing to this State and attempting to mortgage it. *Waters v. Cox*, 2 Ill. App. 129. Compare *Mumford v. Canty*, 50 Ill. 370; *Drew v. Smith*, 59 Me. 393; *Howenstein v. Dames*, 5 Dill. C. Ct. 482; *Hunt v. Jones*, 12 R. I. 265; *Hibernia Bank v. Lacombe*, 21 Hun, 166.

When a contract is made by a common carrier in one State to transport goods from that State into another, and the goods are lost, the rights of the parties are governed by the law of the State in which the loss happens. *Gray v. Jackson*, 51 N. H. 9.

It is important to remember that whenever the law of another jurisdiction is the proper guide, it must be affirmatively shown; but the practical duty of marshalling the proper evidence is much alleviated by the principles of judicial notice and presumption applicable to foreign laws. The general rule is settled that the courts of one State do not take notice of the statutes of another State; see cases cited 5 U. S. Dig. 487, sect. 102. Thus they have refused to take notice of the rate of interest allowed in another State (*Cavender v. Guild*, 4 Cal. 251; *Dorsey v. Dorsey*, 5 J. J. Marsh. 280); even where it was stated in an official table published as an appendix to the State statute book, pursuant to an act of the legislature (*Clark v. Pratt*, 20 Ala. 470; *Harrison v. Harrison*, ib. 629); or to take notice of the insolvent laws of another State (*Mobile, &c. R. R. Co. v. Whitney*, 39 Ala. 468); or of the law regulating distribution of intestate estates (*McDaniel v. Wright*, 7 J. J. Marsh. 475). But it has been held proper to take notice of the constitution of another State, and what jurisdiction it confers upon a court (*Butcher v. Brownsville*, 2 Kan. 70; *Dodge v. Coffin*, 15 Kan. 277); also proper for courts to proceed on their own knowledge of the laws of another State; and in that case it is not necessary to prove them, and their judgment will not be reversed when they proceed on such knowledge, unless it appears that they decided wrongly as to those laws (*Herschfeld v. Drexel*, 12 Ga. 582). The courts of Kentucky know, judicially, what were the laws of Virginia before the separation. *Delano v. Joplin*, 1 Litt. 117, 417. Whenever questions arise under that part of the federal constitu-

where the contract is made. (*h*) A contract or settlement, therefore, made in consideration of marriage, which deals with

tion and laws which provide for the credit to be given to judicial proceedings in other States, and the mode of authentication thereof, the courts will take notice *ex officio* of the local laws of the State from which the record comes, to the same extent as the United States Supreme Court would do (*State v. Hinchman*, 27 Pa. St. 479); also where the laws of one State recognize official acts done in pursuance of the laws of another State, the courts of the State recognizing such acts will take judicial cognizance of the laws of such other State, so far as it is necessary to determine the validity of the acts alleged to be in conformity with them (*Carpenter v. Dexter*, 8 Wall. 513). Whether the courts of a State whose jurisprudence is founded on the civil law will take notice that the common law prevails in other States, and how far they will take notice of the rules of the common law, see *Copley v. Sandford*, 2 La. Ann. 335; *Kling v. Sejour*, 4 ib. 129; *Young v. Templeton*, ib. 254; *Nimmo v. Davis*, 7 Tex. 26; *Bradshaw v. Mayfield*, 18 Tex. 21. If a statute of another State has once been recognized as law in that State by a decision of the courts of Louisiana, the courts of the latter State will thereafter take judicial cognizance of the statute; and until it be proved that the law has been changed, will presume that it still exists. *Graham v. Williams*, 21 La. Ann. 594.

The general rule is also settled that the American courts, State or national, are not bound to take notice of the laws of foreign countries, written or unwritten; but whoever asserts a claim or defence founded on a foreign law must allege and prove the law as matter of fact. *Cheemasero v. Gilbert*, 24 Ill. 293; *Syme v. Stewart*, 17 La. Ann. 73; *Pecquet v. Pecquet*, ib. 204; *Frith v. Sprague*, 14 Mass. 455; *Palfrey v. Portland, &c. R. R. Co.*, 4 Allen, 55; *Baptiste v. De Volunbrun*, 5 Har. & J. 86; *Chouteau v. Pierre*, 9 Mo. 3; *Hooper v. Moore*, 5 Jones L. 130; *Peck v. Hibbard*, 26 Vt. 698; *Woodrow v. O'Connor*, 28 Vt. 776; *Bean v. Briggs*, 4 Iowa, 464; *Owen v. Boyle*, 15 Me. 147. This has been said to be especially true of unwritten foreign laws. *United States v. Wiggins*, 14 Pet. 334. Thus they have refused to recognize foreign usury laws (*Campion v. Kille*, 15 N. J. Eq. 476; *Cooke v. Crawford*, 1 Tex. 9), or revenue laws (*Kohn v. Renaissance*, 5 La. Ann. 25; hence a note, though not stamped according to the laws of the foreign country where made, is valid here, *Ludlow v. Van Rensselaer*, 1 Johns. 94); statutes of Great Britain enacted since the Revolution (*Ocean Ins. Co. v. Fields*, 2 Story, 59); or to sustain an action on a foreign contract on the mere ground that the *lex loci contractus* gave an action (*Pickering v. Fisk*, 6 Vt. 102); or to take notice of the law of France on the subject of days of grace on commercial paper (*Dollfus v. Frosch*, 1 Den. 367); or what are the rights and disabilities of infants, or at what age infancy ceases by the law of Jamaica (*Thompson v. Ketcham*, 8 Johns. 189). A payment of corporate debts by a stockholder in a foreign corporation will be deemed to have been voluntary, in the absence of proof that he was legally liable therefor, as the court does not take judicial notice of foreign laws. *Eastman v. Crosby*, 8 Allen, 206. But in so far as the laws of a foreign country are properly operative as laws within the jurisdiction, the rule that a party claiming under a foreign law must prove it, as matter of fact, does not apply. Thus our courts will notice the laws of Spain which regulated the conveyance of real property in Mobile and the country adjacent when the territory was subject to the dominion of that nation, and are bound to know what documentary evidences of title were records of the province, and to allow copies to be read as evidence accordingly. *Doe v. Eslava*, 11 Ala.

(*h*) Story's Conf. of Laws, sects. 424, 428.

heritable property situate in Scotland, will be construed in England according to the law of Scotland. (i) But a con-

1028. So they take judicial notice of the Spanish laws which prevailed in California, Louisiana, and Missouri, before their cession to the United States. *United States v. Turner*, 11 How. 663; but see *United States v. Philadelphia and New Orleans*, ib. 654. And they have dispensed with proof of public laws of a foreign nation which are on a subject of common concern to all nations, and have been promulgated in the United States by the national executive (*Talbot v. Seeman*, 1 Cranch, 1); also of a custom which has been frequently proved in American courts, fixing the lawful rate of interest in China (*Consequa v. Willings*, Pet. C. Ct. 225.) The law-merchant is not a subject of proof as matter of fact, but will be noticed and applied by the court. *Jewell v. Center*, 25 Ala. 498; *Bradford v. Cooper*, 1 La. Ann. 325; and see *The Lottawanna*, 21 Wall. 558.

With respect to presumptions and burden of proof of the law of another State, one view has been to presume that it is the same with that of the State where the court sits. *Hill v. Grigsby*, 32 Cal. 55; *Cox v. Morrow*, 14 Ark. 603; *Atkinson v. Atkinson*, 15 La. Ann. 491; *Hickman v. Alpaugh*, 21 Cal. 225; *Crane v. Hardy*, 1 Mich. 56; *Cooper v. Reaney*, 4 Minn. 528; *Brimhall v. Van Campen*, 8 Minn. 13; *Robinson v. Dauchy*, 3 Barb. 20. Another view is, that (except as to Louisiana, &c.) the common law should be presumed to have continued, and he who relies on a change should allege and prove it. *Warren v. Lusk*, 16 Mo. 102; *Houghtaling v. Ball*, 19 Mo. 84; *Meyer v. McCabe*, 73 Mo. 236; *Throop v. Hatch*, 3 Abb. Pr. 23; *Griffin v. Carter*, 5 Ired. Eq. 413; and see 5 U. S. Dig. 500, sect. 397. But the better view is to vary the presumption according to the question and the probabilities; thus it has been held that, to sustain contracts, dealings, or acts in another State, the courts may presume a law which would make them lawful (*Smith v. Whitaker*, 23 Ill. 367; *Roberts v. Pillow*, 1 Hempst. 624; *State v. Lawson*, 14 Ark. 114); that one disputing a contract as usurious by the law of the State where made, must prove that law (*Kenyon v. Smith*, 24 Ind. 11; *Davis v. Bowling*, 19 Mo. 651; *Cutter v. Wright*, 22 N. Y. 472); and so if he claims a penalty or forfeiture (*Hull v. Augustine*, 23 Wis. 383); that on a question of regularity of official acts or effect of judicial proceedings in another State, the law of the forum may be followed if the law of place is not proved (*State v. Lawson*, 14 Ark. 114; *Spann v. Crummerford*, 20 Tex. 216); and so it may if the nature of the question does not suggest any presumption (*Wright v. Delafield*, 23 Barb. 498). Thus, also, it has been held that, on questions depending on statute law, no presumption can reasonably be indulged that the statutes of one's own State have been enacted in every other (*Wright v. Delafield*, 23 Barb. 498); but one who seeks advantage from a foreign law, or the law of another State in the Union, must prove it (*Pomeroy v. Ainsworth*, 22 Barb. 118; *Champion v. Wilson*, 64 Ga. 184). Thus where a title is claimed to be valid under the laws of another State, where it was acquired, those laws must be produced in evidence, or proved (*Atkinson v. Atkinson*, 15 La. Ann. 491; see also *Forbes v. Scannell*, 13 Cal. 242); yet if a volume purporting to contain the statute laws of a sister State is offered in evidence, the burden is on the objecting party to discredit it (*Raynham v. Canton*, 3 Pick. 293). A marriage *de facto* in another country cannot be presumed to be a marriage *de jure*, but the foreign law making it valid must be proved (*United States v. Jennegen*, 4 Cranch C. Ct. 118); and a party alleging that an officer recognized by the law-merchant (a notary) has greater powers in the State where he lived and professed to exercise

(i) *Duncan v. Cannan*, 23 L. J. Ch. 265.

tract of marriage made in Scotland * in which trusts [*195] were declared in English form as to English real property, and in Scotch form as to Scotch personalty, was construed as to the English property by English law. (*k*) But contracts in general receive their interpretation either from the law of the country in which the contract is made, the "*lex loci contractus*," or the law of the country in which the contract is to be performed. (*l*) The *lex loci contractus* generally prevails in all that relates to the legal validity of the contract, the "*vinculum obligationis*," and the law and custom of the place of performance in all that relates to the fulfilment of the contract. (*m*) If no place of performance is specified on the face of the contract, the *lex loci contractus* will determine the rights that are acquired on the one side, and the liabilities incurred on the other. If the contract is valid by the law of the country where it is made, it is valid everywhere, unless it is *contra bonos mores*, or is a contract for the doing of a thing which is directly prohibited and forbidden in, or contrary to the public policy of, the country where the contract is sought to be enforced; for when we come to remedies, they must be pursued by the means which the law points out in the place where the remedy is sought to be obtained. (*n*) "So

those powers than in the State of the forum, must prove that fact (*Locke v. Huling*, 24 Tex. 311). In the absence of any finding to the contrary, it will be assumed in favor of a judgment in an action on a contract made in another State, that the *lex loci* is the same as the *lex fori*. *Chapin v. Dobson*, 78 N. Y. 74. Thus, also, it has been held that, on questions of general commercial law, the courts may well presume the rule uniform, and therefore apply the law of the forum, unless a different law abroad is proved (*Wright v. Delafield*, 23 Barb. 498; *Bemis v. McKenzie*, 13 Fla. 553); so that interest is presumed allowable in another State (though whether at the rate prescribed by the law of the forum, query; see *Kermott v. Ayer*, 11 Mich. 181; *Desnoyer v. McDonald*, 4 Minn. 515; *Thomas v. Bechman*, 1 B. Mon. 29; *Ramsay v. McCauley*, 2 Tex. 189); so also that grace has been presumed on sight-bills (*Lucas v. Ladew*, 28 Mo. 342).

The common law is not presumed to be in force in any foreign country except England and countries that have derived the common law from her (*Savage v. O'Neil*, 44 N. Y. 298); and our courts have refused to presume the common law in force in the province of New Brunswick, requiring the existing law to be proved as a matter of fact (*Owen v. Boyle*, 15 Me. 147).

(*k*) *Chamberlain v. Napier*, 15 Ch. D. 614.

(*l*) *Robinson v. Bland*, 1 W. Bl. 256, 259; *Gibbs v. Fremont*, 9 Exch. 25.

(*m*) *Scott v. Pilkington*, 2 B. & S. 11; 31 L. J. Q. B. 81.

(*n*) *Robinson v. Bland*, 2 Burr. 1085; 1 W. Bl. 234, 257; *Forbes v. Cochrane*, 2 B. & C. 471; *Guepratie v. Young*, 4 De G. & Sm. 217; *Cood v. Cood*, 33 L. J. Ch. 278; *Hope v. Hope*, 8 De G. M. & G. 731; 26 L. J. Ch. 417.

much of the law of the country where the contract is made," observes Tindal, C. J., "as affects the rights and merits of the contract, all that relates '*ad litis decisionem*,' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates '*ad litis ordinationem*,' is taken from the *lex fori* of that country where the action is brought." (o)

The rule governing the interpretation of a contract made in one country, to be performed wholly or partly in another, is, that the law of the country where the contract is made governs as to the nature of the obligation and the interpretation of it, if the parties to the contract are either subjects of the power there ruling, or as temporary residents owe that power a temporary allegiance. (p) But a contract between an Englishman domiciled and resident in England, and an Englishman resident in a foreign country, but not having acquired a foreign domicile, must be governed by the rules of English law. (q) And when the government of a state contracts a loan in another country, the [*196] contract is *governed by the law of the borrowing state, and not by that of the country where the contract is made. (r) When a contract is made in a foreign country and in a foreign language, an English court, having to construe it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if any); thirdly, evidence of the foreign law applicable to it; and, fourthly, evidence of any peculiar rule of construction which may exist in that law; and must then itself interpret the document on ordinary principles of construction. (s) Where mutual debts are contracted in a foreign country, the law of that country as to set-off will apply. (t)

Foreign Bonds, Bills, and Notes. — If a bond or obligation for the payment of a sum of money be made in France, and no place of payment is designated on the face of the contract, the extent

(o) Huber v. Steiner, 2 Sc. 304; Leroux v. Brown, 12 C. B. 803; 22 L. J. C. P. 1; De La Vega v. Vianna, 1 B. & Ad. 284; Macfarlane v. Norris, 2 B. & S. 783; 31 L. J. Q. B. 245; Williams v. Wheeler, 8 C. B. N. S. 299.

(p) Peninsular and Oriental Steam Navigation Co. v. Shand, 3 Moo. P. C. N. S. 272.

(q) Cood v. Cood, 33 Beav. 314.

(r) Smith v. Weguelin, L. R. 8 Eq. 198; 38 L. J. Ch. 465.

(s) Di Sora v. Phillips, 10 H. L. Cas. 624.

(t) Macfarlane v. Norris, 2 B. & S. 783; 31 L. J. Q. B. 245; *sed quere*.

of obligation and liability incurred on the one side, and the rights acquired on the other, will be regulated by the law of France; (*u*) but if the money is to be paid in England, the legal effect of the contract will be determined by the English law, the "*lex loci solutionis*." The interpretation and legal obligation of a bill of exchange or a promissory note are regulated by the law of the country where the amount of the bill or note becomes payable by force of the contract, so that on a foreign bill the liability of the acceptor, and the rate of interest payable, where no rate is expressed on the face of the bill, will be determined by the law of the country where the bill is payable; but the obligation of the drawer, who binds himself to pay in case the acceptor does not, will be governed by the law of the place where the bill was drawn, and not by the law of the place where it was to be paid by the drawee. In the case of a bill drawn in France and accepted in England, if the drawer is sued upon the bill, the contract will be governed by the law of France, where the bill was drawn; if the acceptor is sued, it will be governed by the law of England, where the acceptor's contract to pay was made. (*x*) A bill drawn in France *prima facie* bears interest as a debt in France would do, if nothing else appear; but if that bill be indorsed in Belgium, the indorser is a new drawer; and it may be a question whether this indorsement is a drawing of a new bill in Belgium, or only a new drawing of the French bill. In the former case it would carry the Belgian, in the latter the French, rate of interest. (*y*) The indorsement of

* a bill in blank does not according to the French law [* 197] pass the property in the bill absolutely, but only subject to all the exceptions which would be available against the indorser himself; but such an indorsee is entitled to sue on the bill in his own name in France, and therefore can do the same in this country. (*z*) If the bill is drawn and accepted and payable in England, an indorsement in blank in France by a French subject

(*u*) *Melan v. Duke de Fitzjames*, 1 B. & P. 142.

(*x*) *Cammell v. Sewell*, 29 L. J. Ex. 350; 5 H. & N. 728.

(*y*) *Allen v. Kemble*, 6 Moore, P. C.

322; *Gibbs v. Fremont*, 9 Exch. 31; 22 L. J. Ex. 302.

(*z*) *Bradlaugh v. De Rin*, L. R. 5 C. P. 473; 39 L. J. C. P. 254; overruling *Trimbey v. Vignier*, 1 Bing. N. C. 151.

residing there will give to the holder a right to sue the acceptor in this country. (a)

Foreign Purchases — Affreightments. — The fulfilment of a contract for the sale of goods, so far as it relates to the transfer and delivery of the goods to the purchaser, according to quantity, weight, or measure, will be regulated by the law of the country where the delivery is to be made. (b) If a contract is made in England to load a full cargo on board a vessel at a foreign port, the meaning of the words "full cargo" will be regulated by the law of the foreign port, and not by the law of England. If an order is sent from England for the purchase of goods in Russia, to be delivered on board an English ship in a Russian port, the rights and liabilities growing out of the contract will be governed by the law of Russia; and if, after the delivery of the goods on board ship, the unpaid vendor has a right, by the law of Russia, to repossess himself of the goods on having reason to suspect that the purchaser contemplates bankruptcy or intends to make the vendor lose the purchase-money, this right will be recognized in our courts of common law. (c)

The validity of a bottomry-bond taken up in a foreign port upon a foreign ship, freight, and cargo, the owners of the cargo being English, and the ship and cargo being proceeded against in England, is to be governed by the general maritime law, and not by the *lex loci contractus*, or the law of the country the vessel belongs to. (d)

What determines the Locus Contractus.¹ — When contracts are entered into between parties residing in different countries

¹ On the question which State is the place of the contract in cases where the negotiation is conducted by letters exchanged between different States, the general rule regards the place where the final acceptance was mailed as the place where the contract was made; in other words, a contract is considered to have been made in the State where the last act necessary to complete it was done, — or when no mutual act remains to be performed to entitle either party to enforce it. See *ante*, p. *18, American note. Thus contracts of insurance have been held to be complete in the

(a) *Lebel v. Tucker*, L. R. 3 Q. B. 77; P. 289; *Lloyd v. Guibert*, L. R. 1 Q. B. 37 L. J. Q. B. 46. 115; 35 L. J. Q. B. 74.

(b) 3 *Burge Colon. Law*, p. *771; (c) *Inglis v. Usherwood*, 1 East, 515. *Rosseter v. Cahlmann*, 8 Exch. 361; (d) *Duranty v. Hart*, 2 Moo. P. C. Byles, J., *Meyer v. Dresser*, 33 L. J. C. n. s. 289.

through the medium of letters, the place where the final assent has been given by one party to an offer made by another is the place where the contract is considered to have been made. Thus, if a merchant at Genoa, by letter or by agent, offers to sell certain goods to a person in London at a certain price, and the latter accepts the *offer, the contract is made in [*198] London. But if the person in London refuses the offer, and proposes to buy upon different terms, and the merchant of Genoa agrees to the proposal there, the contract will then be deemed to have been concluded at Genoa. (*e*) "If I send my agent to Scotland, and he in my name makes a contract there, it is the same as if I were myself on the spot; and the contract must be considered as a contract entered into in Scotland." (*f*) In the case of contracts in writing, the place where the covenantor or promisor executes or signs the contract is the place where it is made, although the contract is inchoate and incomplete, and does not obtain legal validity until something else has been done with his authority at some different place. (*g*)

When a contract entered into in one country is sought to be enforced in another country, it must not only be valid according to the law of the country where it was made, but also according to the law of the country in which it is sought to be enforced. (*h*)

State where the application was accepted and the policy deposited in the mail for the applicant, and to be governed by the law of that State. *Northampton Live-Stock Ins. Co. v. Tuttle*, 40 N. J. L. 476; *Shattuck v. Mutual Life Ins. Co.*, 4 Cliff. 598; s. p. as to a contract relative to a wife's lands, *Kelly v. Davis*, 28 La. Ann. 773; as to a guaranty, *Bell v. Packard*, 69 Mo. 105; *Milliken v. Pratt*, 125 Mass. 374; and as to prohibited sales, *McIntyre v. Parks*, 3 Met. (Mass.) 207. Compare *Patterson v. Carrell*, 60 Ind. 128; *Frierson v. Williams*, 57 Miss. 451; *Gay v. Rainey*, 89 Ill. 221. But a policy signed by the officers of the company in the company's State, but forwarded upon condition that it shall not be valid until countersigned by the company's agent in the State of the insured, and delivered to the insured upon payment of the premium, is a contract to be governed by the laws of the latter State. *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366; *Todd v. State Ins. Co.*, 11 Phila. 365. A note dated and signed by one maker in one State, but delivered and signed by the other maker and the surety in another, is governed by the laws of the latter. *Hart v. Willis*, 52 Iowa, 56.

(*e*) 2 Burge on Colon. Law, 753.

(*f*) *Albion Fire, &c. v. Mills*, 3 Wils. & Shaw, 233.

(*g*) *Snaith v. Mingay*, 1 M. & S. 92.

(*h*) *Hope v. Hope*, 8 D. M. & G. 731;

26 L. J. Ch. 417; *Grell v. Levy*, 16 C. B. n. s. 79; *Branley v. S. E. Ry. Co.*,

12 C. B. n. s. 72; 31 L. J. C. P. 286.

SECTION II.

OF THE ADMISSIBILITY OF ORAL EVIDENCE IN WRITTEN
CONTRACTS.

Inadmissibility of Oral Evidence to add to, alter, or contradict a Written Contract.¹—Most systems of jurisprudence have

¹ General discussions of the rule excluding parol evidence offered to vary a writing, see 2 Pars. Contr. 547-566; 1 Story, Contr. 797-813; 1 Greenl. Ev. sects. 275-305; 2 Whart. Ev. sects. 920-1070. For the course of the earlier decisions, see U. S. Dig. tit. *Evidence*, V. sects. 2025, 2520; for the scope and extent of the rule, ib. sects. 2557, 2725, 2962; for its limits and exceptions, particularly admissibility of parol evidence to show fraud, ib. sects. 2058-2079, 2589, 2980; or illegality, sects. 2080, 2589; or mistake, sects. 2084-2107, 2596, 2983; to explain ambiguities, sects. 2108, 2598, 2989; to show an independent or collateral contract, sect. 2136; or a pact not reduced to writing, sect. 2155; or a waiver, sect. 2170; or alteration, sect. 2176; to identify the parties, sect. 2179; or the subject-matter, sect. 2193; to prove the attendant circumstances, sect. 2207; or the intent of the parties, sect. 2213; usages and customs, sects. 2224-2251; exception as to strangers to the writing, sect. 2252. For its application to various contracts, namely assignments, see ib. tit. *Evidence*, sect. 2260; bills and notes, ib. tit. *Bills and Notes*, III. tit. *Evidence*, sect. 2290-2423; bills of lading, ib. tit. *Evidence*, sects. 2424-2444; tit. *Shipping*, sect. 1049; bills of sale, ib. tit. *Evidence*, sects. 2445-2476; bonds, ib. tit. *Bonds*, sects. 130-224; tit. *Evidence*, sects. 2477-2517; charter-parties, ib. tit. *Evidence*, V. sect. 2518; tit. *Shipping*, sect. 496; contracts for sale of land, ib. tit. *Evidence*, sect. 2628; of chattels, ib. sect. 2652; deeds, tit. *Deeds*, sect. 1381; tit. *Evidence*, sects. 2666-2883; insurance policies, ib. sect. 2884; leases, ib. sect. 2914; mortgages, ib. tit. *Evidence*, sects. 2953-2999; tit. *Mortgages*, sects. 190-234; releases, ib. tit. *Evidence*, sect. 3079; subscriptions, ib. sect. 3086.

Recent cases: Parol evidence has been held admissible to prove the actual consideration (*Leach v. Shelby*, 58 Miss. 681; *Jackson v. Miller*, 32 La. Ann. 432; *Williams v. Robinson*, 73 Me. 186; *Dean v. Adams*, 44 Mich. 117; *Hyler v. Nolan*, 45 ib. 357; *Altringer v. Capeheart*, 68 Mo. 441; *Audenreid v. Walker*, 11 Phila. 183; see also *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103 and note by A. C. Freeman, ib. 116); the real principal in an agreement made by an agent (*Ellis v. Crawford*, 39 Cal. 523); that an instrument apparently absolute is not so (*Brick v. Brick*, 98 U. S. 514; *Wright v. Gay*, 101 Ill. 233; *Ginz v. Stumph*, 73 Ind. 209; *Hill v. Goodrich*, 39 Mich. 439; *Hyler v. Nolan*, 45 Mich. 357; *Black's Appeal*, 89 Pa. St. 201); and upon what trust a conveyance of property to one "as trustee" was made (*Railroad Co. v. Durant*, 95 U. S. 576); and that a grantee described as "trustee" is really the absolute owner (*Powers v. Provident Inst. for Savings*, 124 Mass. 377; see, further, article by E. McClain, *Deed Absolute in Form when a Mortgage*, 13 West. Jur. 193); that a signature was obtained by fraud or mistake, so that the paper as subscribed is not the real contract intended (*Wilson v. Haecker*, 85 Ill. 349; *Wright v. McPike*, 70 Mo. 175; *McKesson*

manifested a decided preference for written memorials over verbal representations founded on the doubtful or imperfect recollection

v. Sherman, 51 Wis. 303); that the contract was made for an illegal object, and therefore void (*Martin v. Clark*, 8 R. I. 389); to explain why an erasure was made (*Johnson v. Pollock*, 58 Ill. 181); to explain a blank indorsement (*Owing v. Baker*, 54 Md. 82; but see *Martin v. Cole*, 104 U. S. 30; *Johnson v. Ramsey*, 43 N. J. L. 279; *Stack v. Beach*, 74 Ind. 571); to prove the quantity of land intended to be conveyed when courses and distances conflict (*Fisher v. Quackenbush*, 83 Ill. 310; *Hadley v. Citizens' Sav. Inst.*, 123 Mass. 301; *Raymond v. Coffey*, 5 Oreg. 132; *Koch v. Dunkel*, 90 Pa. St. 264; *Edwards v. Tipton*, 77 N. C. 222; *Jones v. Sharp*, 9 Heisk. 660; *Elliott v. Horton*, 28 Gratt. 766); or when natural boundaries and lines of adjoining proprietors are specified but need explanation (*Wellons v. Jordan*, 83 N. C. 371; *Stone v. Clark*, 1 Met. (Mass.) 378, 35 Am. Dec. 370 and note by A. C. Freeman, *ib.* 373); to fix date of payment not fixed in a lease (*Hartsell v. Myers*, 57 Miss. 135); to prove a collateral engagement by the assignee of a bond and mortgage, payment of which was guaranteed, to keep the property insured (*Van Brunt v. Day*, 81 N. Y. 251; s. c. 8 Abb. New Cas. 336; see *Bradshaw v. Combs*, 102 Ill. 428); to prove that loans were made to a bank, though they were charged in the lender's books to the cashier and the cheques were made payable to his order (*Pierson v. Atlantic Nat. Bank*, 77 N. Y. 304); and that alleged partners were merely bondsmen on a building contract (*Bank of California v. White*, 14 Nev. 373); to extend the term in a lease so that tenant could remove building (*Neiswanger v. Squier*, 73 Mo. 192); to explain a receipt, even after the death of the person to whom it was given (*Brice v. Hamilton*, 12 S. C. 32; see further, *Herkiuer v. Nigh*, 10 Ill. App. 372; *Sears v. Wempner*, 27 Minn. 351); or to contradict a mere receipt for interest, indorsed on a promissory note (*Sears v. Wempner*, 27 Minn. 354); to prove an oral guaranty not inconsistent with the contract of sale (*Chapin v. Dobson*, 78 N. Y. 74); to show representations made by manufacturers' agents and contained in printed circular which induced the sale (*Phelps v. Whitaker*, 37 Mich. 72; and see *Richards v. Fuller*, *ib.* 161); to explain whether "dollars" refers to Federal or Confederate money (*Thorington v. Smith*, 8 Wall. 1; *Atlantic, &c. R. R. Co. v. Carolina Nat. Bank*, 19 Wall. 548; *Stewart v. Smith*, 8 Baxt. 231; *Carmichael v. White*, 11 Heisk. 262; *Donley v. Tindall*, 32 Tex. 43; *Culbreath v. Va. Porcelain, &c. Co.*, 22 Gratt. 697; *Bryan v. Harrison*, 76 N. C. 360; compare *Davis v. Glenn*, *ib.* 427); to show that property described as situated in "township thirty," was in fact situated in "township thirty-six" (*Terry v. Benny*, 13 Nev. 514); the meaning of "raceway" (*Wilder v. De Cou*, 26 Minn. 10; compare *Kelly v. Bronson*, *ib.* 359); to identify the liabilities to be secured in a mortgage (*Hall v. Tay*, 131 Mass. 192). Where defendant guaranteed to plaintiff "all such pledges of property, warehouse receipts, and other vouchers" as may from time to time be given by W, evidence was received that W had in fact no such property on hand as was specified in certain alleged warehouse receipts. *Farmers', &c. Nat. Bank v. Lang*, 87 N. Y. 209. Where an assignment from A to B simply acknowledged former's receipt of the money, evidence was received that A sold the property to C and received the money therefor from him, that C sold to B, and then A, at C's request, conveyed to B. *Tillotson v. Ramsay*, 51 Vt. 309. See *ante*, p. * 33, American note 2.

Parol evidence has been held inadmissible: to engraft on a partnership agreement independent stipulations increasing a partner's obligations (*Couch v. Woodruff*, 63 Ala. 466); to raise and explain a patent ambiguity in a written guaranty (*Lazear v. Union Nat. Bank*, 52 Md. 78); to prove a contemporaneous agreement,

of witnesses. The French law requires a very large class of contracts to be put into writing, "in consequence," it observes, "of

that purchaser should be allowed at a certain rate for shortage of timber on the land described (*Hubbard v. Marshall*, 50 Wis. 322); to prove a printer's usage making double measure for "figure work," when the contract provided that no constructive charges should be allowed (*Advertiser, &c. Co. v. Detroit*, 43 Mich. 116); to convert a written agreement into an agreement to make a mortgage, where on its face it expresses no such purpose (*Boehl v. Wadgymar*, 54 Tex. 589); to show that a deed absolute on its face was made upon an express trust (*Green v. Cates*, 73 Mo. 115; *Morrall v. Waterson*, 7 Kan. 199); or that a debtor who took out a life policy payable to his creditor agreed with the creditor that a third person's debts should also be paid out of the proceeds (*Porter v. Sandidge*, 32 La. Ann. 449); to prove verbal admissions modifying a deed (*Morrill v. Robinson*, 71 Me. 24); or to disprove an assertion therein of an assumption of a mortgage (*Muhlig v. Fiske*, 131 Mass. 110); to show, where a note was payable one day after date, that accommodation indorsers were to have four months in which to pay it (*Willse v. Whitaker*, 22 Hun, 242); a disposition of mortgaged chattels inconsistent with a contemporaneous written agreement (*Carlton v. Vineland Wine Co.*, 33 N. J. Eq. 466); or a reservation by grantor of a right to enter and remove buildings (*Smith v. Odom*, 63 Ga. 499); to change date when a guaranty should take effect (*Davis Sewing-Machine Co. v. Stone*, 131 Mass. 384); to charge a wife's separate estate on an ordinary note made by a husband and wife (*Ragsdale v. Gossett*, 2 Lea, 729); to include a grandchild among "children" as beneficiaries under a policy of life insurance (*Russell v. Russell*, 64 Ala. 500); to add to a written contract of sale a warranty as to quantity and quality (*Etheridge v. Palin*, 72 N. C. 213); to prove subsequent as well as prior or contemporaneous declarations of the parties (*Mott v. Richtmyer*, 57 N. Y. 49); to show agreement that a note should not be negotiated by the payee (*Knox v. Clifford*, 38 Wis. 651); to render certain a subscription of "twenty acres of land" to the building of a church (*Palmer v. Albee*, 50 Iowa, 429); to prove that a subscription expressed in money was to be paid in work (*Stewards of Meth. Epis. Church v. Town*, 49 Vt. 29); to discharge an agent from liability on a contract made in his own name (*Bryan v. Brazil*, 52 Iowa, 350); or trustees of a corporation on note signed by them individually (*Scanlan v. Keith*, 102 Ill. 634); to prove intention to include non-releasing as well as releasing creditors under an assignment (*Farrows v. Hay's*, 51 Md. 498); to vary the quantity in a contract for the sale of land (*Baltimore &c. Land Soc. v. Smith*, 54 Md. 187); to prove intention that lead purchased should be "pure lump lead" (*Keller v. Webb*, 126 Mass. 393); to explain what quantity was intended to be sold where the words "more or less" were used (*Shickle v. Couteau*, 10 Mo. App. 241); to prove that lessee of a saw-mill who was to pay rent according to quantity of lumber manufactured, must saw all the lumber which his own land furnished (*Stevens v. Haskell*, 70 Me. 202); to vary the contract of indorsement (*Martin v. Cole*, 104 U. S. 30; *Barnard v. Gaslin*, 23 Minn. 192; *Third Nat. Bank v. Clark*, ib. 263; *Stack v. Beach*, 74 Ind. 571; *Johnson v. Ramsey*, 43 N. J. L. 279; see *Meador v. Dollar Sav. Bank*, 56 Ga. 605, as to what must be pleaded when this is the purpose; and *Stack v. Beach*, *supra*, on limits and exceptions to the rule); to show that a promissory note was not to be paid in money (*Linville v. Holden*, 2 McArthur, 329); to vary contract between master and owners of a whaling-ship (*Slocum v. Swift*, 2 Low. 212); or between pledgor and pledgee of stock (*Fay v. Gray*, 124 Mass. 500); to vary terms of an unambiguous freight contract by proof of general custom or rules of railroad

the corruption of manners and subornation of witnesses," and formally prohibits the admission of oral evidence against the contents of a written document. (i) It is a fundamental rule of our own common law that oral evidence shall not be given to add to, subtract from, or alter or vary any description of written contract: "*quoties in verbis nulla est ambiguitas, nulla expositio contra verba fienda est.*" This general rule or principle of law has been established on the ground that writing stands higher in the scale * of evidence than oral testimony, and that the [*199] stronger evidence ought not to be controlled or altered by the weaker. (k) It has been held that oral evidence is inad-

company (*Martin v. Union Pacific R. R. Co.*, 1 Wy. Terr. 143; but if the contract be susceptible of different constructions, evidence of general usage and course of business in delivery of freight is admissible, *New York Central, &c. R. R. Co. v. Standard Oil Co.*, 87 N. Y. 486).

As respects the date, the law presumes that a contract was executed the day it bears date, though parol testimony is admissible to show that it was in fact executed on a different day (*Gately v. Irvine*, 51 Cal. 172; *Abrams v. Pomeroy*, 13 Ill. 133; *Pitts, &c. Co. v. Poor*, 7 Ill. App. 24; *Meldrum v. Clarke*, 1 Morr. 130; *Shaughnessy v. Lewis*, 130 Mass. 355; but see *Davis, &c. Co. v. Stone*, 131 Mass. 384; *Breck v. Cole*, 4 Sandf. 79; *Dodge v. Hopkins*, 14 Wis. 630); and so a note given and accepted is presumed to have been given on the day it bears date, in the absence of evidence to the contrary (*Claridge v. Klett*, 15 Pa. St. 255; *Williams v. Wood*, 16 Md. 220). But instruments take effect from the time of their delivery, whatever date they may bear. *Churchill v. Baily*, 13 Me. 64; and see *Stearns v. Haven*, 16 Vt. 87. An impossible date raises a presumption of *ante* or *post* dating, not of alteration. *Davis v. Loftin*, 6 Tex. 489. Where an instrument without date provides for the payment of a sum of money on a day named, the presumption is that it was made before that day. *Cleavinger v. Reiar*, 3 Watts & S. 486. It may be presumed that a warehouseman's receipt, and a guaranty indorsed thereon, were executed at the same time and as parts of the same transaction (*Underwood v. Hoosack*, 38 Ill. 208); and where the date of the assignment of a note does not appear, the presumption is that the note was assigned when executed (*Hayward v. Munger*, 14 Iowa, 516); or, at least, before maturity (*Richards v. Betzer*, 53 Ill. 466). R gave L an order on a debtor for a sum certain, less than the whole debt; R gave F an order on the same debtor for the whole balance due R; the order to F was lost; it was held that, in the absence of any evidence on the subject, the order to L must be presumed to have been given first. *James River v. Littlejohn*, 18 Gratt. 53. If a written promise to pay money is given, with a condition providing that it shall be void upon the happening of a certain event, the burden of proof in an action against the maker is upon the defendant to show that the event has happened. *Thayer v. Connor*, 5 Allen, 25. Where there are several contracts on the same matter of different dates, inconsistent with each other, the latest must control. *Loper and Reybold v. United States*, 13 Ct. of Cl. 269.

(i) Poth. Obl. No. 785.

(k) *Davis v. Symonds*, 1 Cox. 404.

missible to show that a grant of an annuity, not made subject to redemption on the face of the deed, was nevertheless intended by the parties to be redeemable; (*l*) also that the verbal declaration of an auctioneer, made at the time of sale, cannot be given in evidence in opposition to the printed conditions of sale, unless the declaration has been fraudulently made. (*m*) If in a contract of charter-party a person states himself to be the owner of a vessel, and then proceeds to let or charter the vessel for a certain term, he cannot contradict by oral testimony his own averment in writing, and show that he acted only as the agent of the owner. (*n*) If a written contract of purchase and sale describes the nature and character of the things sold, oral evidence is inadmissible to add to or alter the written description; (*o*) if it fixes the time for the completion of the purchase, or the time for the delivery of the goods, a contemporary agreement to substitute another day must be expressed in writing; (*p*) and if the time for payment is named, oral evidence is inadmissible to show that the payment was to be prolonged, or that it was to depend on a contingency, or be made out of a particular fund. So, on a written contract for a weekly hiring, oral evidence is inadmissible to show that a yearly hiring was intended. (*q*) And on a contract to manufacture and deliver goods at a specified time for a specified price, oral evidence is inadmissible to show that a portion of the price agreed to be paid for the goods was in consideration of the undertaking to deliver them at the times specified, and that the market price was much less than that agreed to be paid. (*r*) Oral evidence is inadmissible to make a promissory note, absolute upon the face of it, conditional or payable upon a contingency, (*s*) or to make a contract which by the

(*l*) *Haynes v. Hare*, 1 H. Bl. 662.

(*m*) *Gunnis v. Erhart*, 1 H. Bl. 289; *Shelton v. Livius*, 2 Cr. & J. 411; *Higginson v. Clowes*, 15 Ves. 522; *Eden v. Blake*, 13 M. & W. 618.

(*n*) *Humble v. Hunter*, 17 L. J. Q. B. 350.

(*o*) *Smith v. Jeffreys*, 15 L. J. Ex. 325; *Harnor v. Groves*, 24 ib. C. P. 53.

(*p*) *Stead v. Dawber*, 10 Ad. & E. 57; 2 P. & D. 451; *Marshall v. Lynn*, 6 M.

& W. 109; *Stowell v. Robinson*, 3 Bing. N. C. 928.

(*q*) *Evans v. Roe*, L. R. 7 C. P. 138.

(*r*) *Brady v. Oastler*, 3 H. & C. 112; 33 L. J. Ex. 300.

(*s*) *Rawson v. Walker*, 1 Stark. 361; *Moseley v. Hanford*, 10 B. & C. 729; *Foster v. Jolly*, 1 C. M. & R. 703; *Free v. Hawkins*, 1 Moore, 535; 8 Taunt. 92; *Adams v. Wordley*, 1 M. & W. 374; *Abrey v. Crux*, L. R. 5 C. P. 37; 39 L. J. C. P. 9.

terms of it is to commence *in præsenti*, to commence *in futuro*, (*t*) or to show that it was agreed, when a bill or note was given or indorsed, that the instrument should be renewed, and that payment should not be demanded at the time when it became due (*u*); but where * bought and sold [* 200] notes differed, oral evidence was admitted to prove an arrangement between the broker and the purchaser, by which the apparent variance was explained and shown to be immaterial. (*x*)

A warranty made orally on the completion of a written contract of sale, cannot be introduced as part of the contract if the contract itself is silent as to the fact of such warranty; (*y*) but a loose and incomplete memorandum of sale will not exclude oral evidence of a warranty. (*z*) If a written demise be silent as to the payment of the ground rent, (*u*) or land tax, (*b*) oral evidence is inadmissible to show that the tenant agreed to pay it. If a written contract of purchase and sale imports that the delivery of the goods and the payment of the price are to be concurrent acts, oral evidence is inadmissible to show that credit was bargained for and intended to have been given. (*c*) But a writing containing only part of the contract, and not being evidence of a concluded agreement, does not shut out oral evidence of the time of payment. Where the defendant by letter ordered the plaintiff to send goods to a wharf, oral evidence was admitted to show that the order was given on the faith of a promise made by word of mouth by the plaintiff to the defendant that the defendant should have six months' credit for the payment of the goods. (*d*) When an agreement for a lease has been drawn up in writing, oral evidence cannot be given to show that more premises were intended to be included in the agreement than those actually mentioned in it, or that a greater rent was to be paid than that actually expressed, or that the rent was to be paid quarterly,

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| (<i>t</i>) Williams v. Jones, 5 B. & C. 108. | (<i>a</i>) Preston v. Merceau, 2 W. Bl. |
| (<i>u</i>) Hoare v. Graham, 3 Campb. 56; | 1249. |
| Brown v. Langley, 5 Sc. N. R. 249. | (<i>b</i>) Rich v. Jackson, 4 Br. C. C. 515. |
| (<i>x</i>) Kempson v. Boyle, 3 H. & C. 763; | (<i>c</i>) Ford v. Yates, 2 Sc. N. R. 645. |
| 34 L. J. Ex. 191. | (<i>d</i>) Lockett v. Nicklin, 19 L. J. Ex. |
| (<i>y</i>) Powell v. Edmunds, 12 East, 6; | 403; 2 Ex. 93; Stones v. Dowler, 29 L. |
| Harnor v. Groves, 15 C. B. 667. | J. Ex. 122; Angel v. Duke, L. R. 10 Q. |
| (<i>z</i>) Allen v. Pink, 4 M. & W. 140. | B. 174. |

when by the agreement it is to be paid yearly, or that the rent was to commence at a later day than that named in the agreement; for whenever the contract is reduced into writing, nothing that is not found impressed upon it can be considered as forming part of the contract. *(e)* But the contract may be evidenced and established, as we have previously seen, through the medium of several writings, as well as by one document; and the import of a written paper, purporting to contain the terms of a contract, may be controlled, altered, or extended by a contemporaneous agreement in writing, *(f)* provided it be shown that both papers refer to the same subject-matter, persons, and things.

[* 201] And where there is a proposal only in *writing, oral evidence may be given to show that that proposal has been accepted, *(g)* but not of what passed at the time of making the proposal for the purpose of varying the contract. *(h)*

Where there was a discrepancy between a lease and its counterpart, the counterpart was looked at to ascertain where the mistake lay. *(i)*

But although, by the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made or during the time that it was in a state of preparation, so as to add to, subtract from, or in any manner to vary or qualify the express terms of the written contract, *(k)* yet an agreement upon a distinct matter may be shown to have been made by word of mouth, and may be enforced; *(l)* and after an agreement has been reduced into writing, it is competent to the parties at any subsequent time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or

(e) *Meres v. Ansell*, 3 Wils. 275; *Henson v. Coope*, 3 Sc. N. R. 48; *Kain v. Old*, 4 D. & R. 61; *Dickson v. Zizinia*, 20 L. J. C. P. 73.

(f) *Brown v. Langley*, 5 Sc. N. R. 249.

(g) *Wake v. Harrop*, 6 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273.

(h) *Hotson v. Browne*, 9 C. B. N. s. 442; 30 L. J. C. P. 106.

(i) *Burchell v. Clark*, 2 C. P. D. 88.

(k) *Lord Hardwicke, Pateriche v. Powlet*, 2 Atk. 383; *Woollam v. Hearn*, 7 Ves. 218.

(l) *Lindley v. Lacey*, 34 L. J. C. P. 7; 17 C. B. N. s. 578; *Morgan v. Griffith*, L. R. 6 Ex. 70; 40 L. J. Ex. 46; *Erskine v. Adiane*, L. R. 8 Ch. 756; 42 L. J. Ch. 855.

in any manner to add to, subtract from, or vary or qualify the terms of it, and thus to make a new contract, which may be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon it, provided the new contract thus sought to be established in the place and stead of the original written contract be not a contract of such a nature as is required to be authenticated by writing; for when that is the case, the new substituted contract cannot be proved partly by writing and partly by oral testimony, (*m*) and will not be good for any purpose; but the original contract will remain in force. (*n*) Parol evidence is however admissible where it goes to show, not a new contract, but simply a voluntary forbearance by the plaintiff at the request of the defendant; for in such a case the statute of frauds does not apply; (*o*) and it is immaterial whether the request for forbearance was made before or after the contract was broken. (*p*)

When Contracts may be proved partly by Writing and partly by Oral Testimony.¹ — Oral testimony in aid of insufficient written * evidence of a contract is admissible when [*202] the contract is not required by law to be in writing. If a written document, for example, amounts to a mere admission or acknowledgment of certain facts, forming a link only in the chain of evidence by which a contract is sought to be established, it may be given in evidence concurrently with, and may be aided and supported by, oral testimony. (*q*) Thus in the case of a contract for work and services, if the names of the contracting parties are not mentioned, or the price to be paid for the work is not specified, or the quantity not named, and the writing consequently does not amount to a contract, oral proof of the additional facts and circumstances necessary to constitute a contract and give effect to the transaction is admissible. Such evidence

¹ See *ante*, p. * 158, note.

(*m*) *Goss v. Lord Nugent*, 5 B. & Ad. 275; *ib.* 3 Q. B. 272; 7 B. & S. 855; 65; *Stead v. Dawber*, 10 Ad. & E. 65; 36 L. J. Q. B. 175; 37 L. J. Q. B. 77. (*p*) *Hickman v. Haynes*, L. R. 10 C. P. 598.

(*n*) *Noble v. Ward*, 36 L. Ex. 91; L. R. 2 Ex. 135; *Plevens v. Downing*, 1 C. P. D. 220. (*q*) *Eden v. Blake*, 13 M. & W. 618; *Bolckow v. Seymour*, 17 C. B. N. S. 107; *Stones v. Dowler*, 29 L. J. Ex. 122.

(*o*) *Ogle v. Lord Vane*, L. R. 2 Q. B.

does not alter or add to an existing contract, as no contract exists independently of it. (*r*) An invoice made out after a sale of goods has been effected is not conclusive evidence that the parties named in it as the contracting parties are really the contracting parties; but oral evidence is admissible to show that a party named therein as a vendor was not in reality the vendor. (*s*) Where the plaintiff signed a consignment note, which stated that certain goods were delivered by him to a railway company to be carried to N, but the charge for carriage was not mentioned, and oral evidence was given that the company's agreement with the plaintiff before the note was signed was to carry to K, but that the plaintiff did not read the note, and that the sum to be charged, and which was paid, was for the carriage to K, it was held that the evidence was admissible on the ground that the note was not a complete contract. (*t*) A document purporting to be a contract, signed by the parties, is not necessarily so; and it is competent for either of the parties to show by parol evidence that it was not their intention in signing it that it should operate as a contract, and that the real contract between them was not in writing. (*u*) And generally oral evidence is admissible for the purpose of showing that the real contract between the parties is not in writing, and that a subsequent written contract does not contain, and was not intended to contain, the whole agreement between them. (*x*) But where a written proposal, signed by the defendant, was adopted in terms by the plaintiff, though not in writing, it was held that evidence of what [* 203] passed at the time of making the proposal was not *admissible for the purpose of varying the construction of the writing. (*y*) Oral evidence is always admissible for the purpose of identifying the subject-matter of the contract, as, for instance, to show that a contract referring to a bill as of the 24th of October was intended to apply to one dated the 25th, (*z*)

(*r*) *Knapp v. Harden*, 1 Gale, 47; *Ingram v. Lee*, 2 Campb. 521.

(*s*) *Holding v. Elliott*, 5 H. & N. 117; 29 L. J. Ex. 134.

(*t*) *Malpas v. London and South-Western Ry. Co.*, L. R. 1 C. P. 336; 35 L. J. C. P. 166, explaining *Jeffery v. Walton*, 1 Stark. 267.

(*u*) *Rogers v. Hadley*, 2 H. & C. 227; 32 L. J. Ex. 241.

(*r*) *Harris v. Rickett*, 4 H. & N. 1; 28 L. J. Ex. 197.

(*y*) *Hotson v. Browne*, *ante*, p. * 201.

(*z*) *Way v. Hearn*, 13 C. B. N. s. 292; 32 L. J. C. P. 34.

or to explain what was meant by the words "your wool" in a contract for the purchase of wool so described, (a) or the words "your employ" in a contract of service, (b) or the words "the lease" in an agreement to procure a lease. (c) In equity, a defendant may prove a parol variation or addition to a written contract where he is resisting specific performance of the contract; and a plaintiff may also make use of a parol variation when there has been such a part performance of the parol portion of the agreement as would enable the court to decree a specific performance in the case of an original and independent agreement, or where the omission has occurred by fraud, or, in cases not within the statute of frauds, by clear mistake. (d)

Annexation of Agricultural and Mercantile Customs.¹—Customary rights and incidents universally attaching to the subject-

¹ Usage or custom is a source of law in all governments, and is always presumed to have been adopted with the consent of those who may be affected by it. *United States v. Arredondo*, 6 Pet. 691. The test of a commercial usage is that it has existed a sufficient time to have become generally known, and to warrant a presumption that contracts are made in reference to it (*Smith v. Wright*, 1 Cai. 43), if there is nothing in the agreement to exclude the inference (*Hinton v. Locke*, 5 Hill (N. Y.), 437; *Outwater v. Nelson*, 20 Barb. 29; and see *Wadsworth v. Allcott*, 6 N. Y. 64). Thus where it was the established usage of a warehouse-keeper to deliver property to houses in good standing, relying upon their personal credit for the payment of the storage, it was held that the right of lien was waived, and that it must be presumed that plaintiffs contracted on the same terms as others in like situations, until the contrary is shown. *Dunbar v. Pettee*, 1 Daly, 112. Where, in a suit for loss by fire of a quantity of rice deposited at a mill to be beaten, it was proved that the general custom of the mill was to give a receipt to the owner of rice delivered there, expressing the quantity and terms of deposit, the court held, in the absence of proof to the contrary, that the presumption was that a receipt was given. *Ashe v. De Rosset*, 8 Jones L. 240. Where it was the usage of a hotel to deposit all letters left at the bar in an urn kept for that purpose, whence they were sent, almost every fifteen minutes throughout the day, to the rooms of the different guests to whom they were directed, it may be presumed that a letter addressed to one of the guests, and left at the bar, was received by him (*Dana v. Kemble*, 19 Pick. 112); and, generally, proof that a letter was deposited, duly addressed and prepaid, in a post-office, raises a presumption that it was delivered according to postal usages (*Briggs v. Hervey*, 130 Mass. 186). If it has been customary to choose but three selectmen in a town, it will be presumed that three was the number chosen (*Jay v. Carthage*, 48 Me. 353); so the usage

(a) *Macdonald v. Longbottom*, 1 Ell. & Ell. 977; 28 L. J. Q. B. 293; 29 ib. 256.

(b) *Mumford v. Gething*, 7 C. B. N. S. 305; 29 L. J. C. P. 105.

(c) *Horsely v. Graham*, L. R. 5 C. P.; 39 L. J. C. P. 58.

(d) *Woolam v. Hearn*, 2 W. & T. Lead. Cas. in Eq., 2d ed., p. 404; *Laver v. Fielder*, 32 Beav. 1.

matter of the contract in the place and neighborhood where the contract was made, are impliedly annexed to the written language

of two towns for fifty years as to the mode of settling the yearly expenses of a bridge, was held to raise a presumption that that was the contemporaneous construction of their rights when the usage commenced, or was presumptive evidence of a new and original agreement. *Cambridge v. Lexington*, 17 Pick. 222. Where a drain was excepted in a sale, it was presumed to have previously existed by usage, or to have been excepted in previous deeds. *Bergen v. Bennett*, 1 Cai. Cas. 1. Those who navigate steamboats on the Ohio River are presumed to know the usage of the river in respect to boats running in opposite directions, and are bound by it. *Barrett v. Williamson*, 4 McLean, 597.

Upon the principle that the courts know judicially the general course of the ordinary transactions of human life, they will take notice of the meaning of ordinary abbreviations, such as "adm'r" for administrator (*Mosely v. Mastin*, 37 Ala. 216); or of the customary abbreviations of christian names (*Stephen v. State*, 11 Ga. 225; *Weaver v. McElhenon*, 13 Mo. 89); of the sex of a party from the name and the use of the pronoun "she" (*O'Boyle v. Brown, Wright*, 465); of the ordinary modes of transacting commercial business within the State (*Bronson v. Wiman*, 8 N. Y. 182, 10 Barb. 406); of the great lines of travel, and their connection, and the usual course of transportation throughout the country (*Smith v. New York Central R. R. Co.*, 43 Barb. 225; *Maghee v. Camden, &c. R. R. Co.*, 45 N. Y. 514); of the usual length of Atlantic voyages (*Oppenheim v. Wolf*, 3 Sandf. Ch. 571); of the notorious course of trade between two ports (*The Mersey, Blatchf. Prize Cas.* 187); of the peculiar nature of and usual mode of conducting lotteries (*Salomon v. State*, 28 Ala. 83); of the notorious connection between allied trades, such as those of an ambrotypist, a daguerrotypist, and a photographer (*Barnes v. Ingalls*, 39 Ala. 193); of the recurrence of Sundays and great festivals, such as Christmas, and the commercial usage to observe them, so that if a note falls due on such day it should be protested on the day previous (*Sasscer v. Farmers' Bank*, 4 Md. 409); of the character of the circulating medium and popular language in reference to it (*Lampton v. Haggard*, 3 T. B. Mon. 149; *Jones v. Overstreet*, 4 ib. 547); of the legal coins made at the mint of the United States, pursuant to law, and of foreign coins made current by law (*United States v. Burns*, 5 McLean, 23; *McButt v. Hoge*, 2 Hilt. 81); of the fact that gold coin was for a time disused as money in the business of the country, and became an article of merchandise and traffic (*United States v. American Gold Coin*, 1 Woolw. 217); of the prices of ordinary labor (*Bell v. Barnett*, 2 J. J. Marsh. 516); that a freemasons' lodge is a charitable or eleemosynary body (*Burdine v. Grand Lodge*, 37 Ala. 473, 1 Ala. Sel. Cas. 385). But the courts have refused to take notice that "St. Louis, Mo.," in the date of a contract, means St. Louis in the State of Missouri (*Ellis v. Park*, 8 Tex. 205); or that a note expressed to be payable in "New Orleans, La.," is meant to be payable in the State of Louisiana (*Russell v. Martin*, 15 Tex. 238); or of what railroads run through a particular county (*Logansport, &c. R. R. Co. v. Caldwell*, 38 Ill. 280); or to take notice of the time which railroad cars require for running between different places, and the frequency of mails between them (*Wiggins v. Bursham*, 10 Wall. 129); or of the length of time required by an express company in carrying a sum of money from one specified town to another (*Rice v. Montgomery*, 4 Biss. 75); of a custom for a locator to take one-third of the land for his services (*Louges v. Kennedy*, 2 Bibb. 607); or of what are the fair and usual commissions on acceptances paid without funds (*Seymour v. Marvin*, 11 Barb. 80); or of whether or not there are proper and

and terms of the contract, unless the custom is particularly and expressly excluded. (*e*) Parol evidence of custom and usage, consequently, is always admissible to enable us to arrive at the real meaning of the parties, (*f*) but not to prevail over and nullify the express provisions and stipulations of the contract. (*g*) The evidence of usage must, however, be clear and distinct, in order to affect the meaning of the terms of the contract, (*h*) and not be inconsistent therewith. (*i*) The known and received usage of a particular trade or profession, and the established course of every mercantile or professional dealing, are considered to be

legitimate modes of expending money in procuring the passage of an act of the legislature (*Judah v. Trustees*, 16 Ind. 56); or of the current rate of exchange (*Lowe v. Bliss*, 24 Ill. 169); or of the value of Canada currency, and the rate of interest in Canada (*Kermott v. Ayer*, 11 Mich. 181); or of usages and customs of mining districts (*Sullivan v. Hense*, 2 Col. T. 424); or of the general organization and administration of the Methodist Episcopal Church (*Sarahass v. Armstrong*, 16 Kan. 192); or of the canons, rubrics, or rules of any particular church (*Youngs v. Ransom*, 31 Barb. 49); or of the rules and usages of the board of brokers, unless they are rules or usages of trade and commerce, which would be recognized without their adoption by any particular board or association (*Goldsmith v. Sawyer*, 46 Cal. 209); or of the fact that a railroad company has a corporate seal, for the purpose of impeaching an appeal bond filed by them, bearing a scroll for a seal (*Illinois Central R. R. Co. v. Johnson*, 40 Ill. 35); or of a *pro tem.* appointment of one of the directors of a bank as president (*Crawford v. Branch Bank*, 7 Ala. 383); or of the meaning of the term "whaling voyage," employed in a policy (*Child v. Sun Mut. Ins. Co.*, 3 Sandf. 26); or of the meaning of printers' marks at the foot of an advertisement, so as to infer the date and number of times a notice has been published, from abbreviations at the foot of the slip as printed, such as "Oct. 3, 4t" (*Johnson v. Robertson*, 13 Md. 476). An unreasonable, &c. custom is inoperative. *Fuller v. Robinson*, 86 N. Y. 306.

For a general view, see *Lawson, Usages and Customs* (1881). The requisites to their validity, *ib.* Ch. 1; the proof necessary to establish them, *ib.* Ch. 2; their effect on different relations and occupations, *ib.* Ch. 3: as, banking, sect. 65; carriers, sect. 78; corporations, sect. 103; insurance, sect. 108; landlord and tenants, sect. 126; master and servant, sect. 134; partnership, sect. 138; agency, sect. 142; sales, sect. 156; their admissibility to vary writings, *ib.* Ch. 4, 5.

(*e*) Many agricultural customs have been embodied in the Agricultural Holdings Act, 38 & 39 Vict. c. 92, and for divers customs of different counties see *Woodfall's Landlord and Tenant*, 11th ed., by Lely, 721.

(*f*) *Hutton v. Warren*, 1 M. & W. 475, 476; *Domat*, liv. 1, tit. 1; *Wiglesworth v. Dallison*, 1 Doug. 201; 1 *Smith's L. C.* 5th ed., p. 520.

(*g*) *Clarke v. Roystone*, 13 M. & W.

752; 14 L. J. Ex. 143; 2 *Taylor on Evidence*, p. 1026, 5th ed.; *Blackett v. Royal Exchange Assurance Co.*, 2 C. & J. 429; *Roxburghe v. Robertson*, 2 Bligh, 156; *Roberts v. Barker*, 1 C. & M. 808; *Phillips v. Briard*, 1 H. & N. 21; *Cuthbert v. Cumming*, 24 L. J. Ex. 200.

(*h*) *Bowes v. Shand*, 2 Ap. Cas. 455.

(*i*) *Hayton v. Irwin*, 5 C. P. D. 130, C. A.

tacitly annexed to the terms of every mercantile or professional contract made in the ordinary course of business in which [* 204] the * usage prevails, (*k*) if there be no words therein expressly controlling or excluding the ordinary operation of the usage; and parol evidence thereof may consequently be brought in aid of the written instrument. (*l*) The principle on which the evidence is admitted is that the parties have set down in writing those only of the terms of the contract which were necessary to be determined in the particular case, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must be considered to contract, unless they expressly exclude them. (*m*) Whether the terms of the contract are such as to exclude evidence of the custom, is a question for the judge, and not for the jury. (*n*) A local custom or usage of a particular place or of a particular class of persons is not binding upon persons living at a distance, and who are proved to have been wholly unacquainted with such usage. (*o*) And a custom in a particular market that a broker to buy is a principal to sell, is not binding upon a person ignorant of the existence of such custom, for it changes the intrinsic character of the contract. (*p*) And so is a rule that a broker can only recognize the person employing him, although he knows him to be only an agent. (*q*) If the terms of the contract are clear, they must prevail, in the absence of very clear and consistent evidence that, by custom, something different is meant. (*r*) But if a merchant residing in London employs an agent in Liverpool to make

(*k*) *Allan v. Sunding*, 1 H. & C. 123; 31 L. J. Ex. 307. *Murton*, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49.

(*l*) *Syers v. Jonas*, 2 Exch. 111; (*n*) *Parker v. Ibbetson*, 4 C. B. 8. s. 355; 27 L. J. C. P. 236.
Grant v. Maddox, 15 M. & W. 737;
Bourne v. Gatliffe, 3 Sc. N. R. 10.

(*m*) *Hunfrey v. Dale*, 26 L. J. Q. B. 140; 7 Ell. & Bl. 266; Ell. Bl. & Ell. 1004; 27 L. J. Q. B. 390; *Lucas v. Bristow*, 27 ib.; Q. B. 364; Ell. Bl. & Ell. 907; *Reg. v. Stoke-upon-Trent*, 13 L. J. M. C. 41; *Brown v. Byrne*, 3 Ell. & Bl. 715; *Cuthbert v. Cumming*, 10 Exch. 815; *Field v. Lelan*, 6 H. & N. 617; 30 L. J. Ex. 168; *Myers v. Sarl*, 30 L. J. Q. B. 9; 3 Ell. & Bl. 306; *Fleet v.*

(*o*) *Lord Tenterden*, C. J., *Bartlett v. Pentland*, 10 B. & C. 770; *Kirchner v. Venus*, 12 Moore P. C. 399; *Sweeting v. Pearce*, 30 L. J. C. P. 109; 9 C. B. 8. s. 534.

(*p*) *Robinson v. Mollett*, L. R. 7 H. L. 802.

(*q*) *Pearson v. Scott*, 9 Ch. D. 198.

(*r*) *Bowes v. Shand*, 3 Ap. Cases, 455; *Hayton v. Irwin*, 5 C. P. D. 130.

a contract there, the contract so made will be clothed with all the incidents of a Liverpool contract in respect of custom and usage of trade. (s) Where the written contract does not exclude the custom, oral evidence is not admissible for the purpose of showing that the parties did not intend it to apply. (t) Oral evidence is admissible to show that by the custom of a particular trade, persons describing themselves in the contract as "agents to merchants" are personally liable if they do not disclose their principals within a reasonable time. (u)

*** Customary Meaning of Particular Words.** — If by [* 205] the known usage of trade or by custom a word has acquired, in respect of the subject-matter of the contract, a peculiar sense and meaning different from the ordinary popular sense, and meaning, evidence is admissible to show that the parties used the word in its customary trade acceptance, and not in the ordinary popular sense. Thus the word *thousand* in certain trades comprehends a larger number of units than it does in its ordinary acceptance. In the herring trade, for example, *six* score herrings went to the hundred, and sixty to the thousand; and parol evidence was consequently held to be admissible to show that the word "thousand," when applied to herrings in the contracts of herring-dealers, meant twelve hundred. In a lease of a rabbit-warren, parol evidence was admitted to show that, by the custom of the country where the lease was made, in taking an account of the rabbits on a rabbit warren, the numbers were computed at one hundred dozen to a thousand; and the word "thousand" in a lease as applied to rabbits was consequently construed to mean one hundred dozen, or twelve hundred. (x) So where an insurance was effected "to any port in the Baltic," evidence was admitted to show that the Gulf of Finland is considered by universal custom and consent amongst merchants and in mercantile contracts to be within the Baltic, though the two seas are treated as distinct by geographers. (y)

(s) *Graves v. Legg*, 2 H. & N. 213; 26 L. J. Ex. 316.

(t) *Fawkes v. Lamb*, 31 L. J. Q. B. 98; but see *Burges v. Wickham*, 33 L. J. Q. B. 17.

(u) *Hutchinson v. Tatham*, L. R. 8 C. P. 482.

(x) *Smith v. Wilson*, 3 B. & Ad. 728.

(y) *Uhde v. Walters*, 3 Campb. 16; *Brough v. Whitmore*, 4 T. R. 210; *Anderson v. Pitcher*, 2 B. & P. 168.

And in a lease of a coal mine, evidence was admitted to show that the word "*level*" in mining districts had a meaning different from the ordinary popular meaning, and that the word was used by the parties to the contract in the sense in which it is ordinarily employed by miners. (c) But the custom and usage must be general and universal, and not the practice or course of dealing of a particular firm or house of trade, such as the usage of Lloyd's. (a)

Terms of Art — Trade Acceptations.¹ — The meaning of all words and terms of art and specifications of quantity, quality, weight, and measure, are regulated and controlled by local custom, unless the terms have been selected and a definite meaning given to them by the legislature. (b) But to vary the

¹ Words peculiar to an art, science, or vocation, words appearing to have been used in their technical rather than their popular meaning, must be read in their technical sense, which may be ascertained as a question of fact by the testimony of experts (2 Min. Inst. 957; 2 Pars. Contr. 493, 535, 555; 1 Story, Contr. (5th ed.) 803); and words which had acquired a special sense by usage of a trade or business, probably within the view of the parties when contracting, will be read in that sense, which may be ascertained by the testimony of persons conversant with the usage. *Doane v. Dunham*, 79 Ill. 131; *Rindschiff v. Barrett*, 14 Iowa, 101; *Robinson v. Fiske*, 25 Me. 401; *Appelman v. Emerson*, 9 Pick. 422; *Eaton v. Smith*, 20 Pick. 150; *Hinton v. Locke*, 5 Hill (N. Y.), 437; *Astor v. Union Ins. Co.*, 7 Cow. 202; *Coit v. Commercial Ins. Co.*, 7 Johns. 385; *Dana v. Fiedler*, 12 N. Y. 40; *Laurence v. Gallagher*, 42 N. Y. Superior Ct. 309; *Wayne v. The General Pike*, 16 Ohio, 421; *Lacy v. Green*, 84 Pa. St. 514.

Where the terms of a contract are plain, usage cannot be allowed to affect materially the construction to be placed upon the instrument; but when the terms are ambiguous, usage may influence the judgment of the court in ascertaining what the parties meant when they employed such terms. *Moran v. Prather*, 23 Wall. 492; see also *Brown v. Foster*, 113 Mass. 136.

However terms may be understood in their ordinary sense, if the parties have attached other, or unusual, or arbitrary meanings to them, to be derived from their fair interpretation in the contract, they have the right so to employ them. But to accomplish such purpose, and to vary the common understanding, the meaning ought to be plain and free from reasonable doubt. *McCoy v. Erie, &c. Transp. Co.*, 42 Md. 498.

Where one party in making an offer uses a term — such as buying "on margin" — which has acquired a special and well-understood sense in the business to which the negotiation belongs, and the other party, supposing the word to be used in that sense, accepts the offer and acts upon it, the first party will not afterwards be allowed to deny that meaning. *Hatch v. Douglas*, 48 Conn. 116.

(z) *Clayton v. Gregson*, 5 Ad. & E. 302.

(b) *Taylor v. Briggs*, 2 C. & P. 525;

(a) *Gabay v. Lloyd*, 3 B. & C. 797; *Hutchison v. Bowker*, 5 M. & W. 535; *Sweeting v. Pearce*, p. * 204; *Scott v. Spicer v. Cooper*, 1 Q. B. 424. *Irving*, p. * 691.

meaning of plain words, the existence of the custom must be "clear, cogent, and irresistible." (c) If there are peculiar expressions used in a contract which have in a particular place or trade a known meaning * attached to them, it [* 206] is for the jury to say what the meaning of those expressions is, but for the court to decide what is the meaning of the contract. (d)

Oral Evidence of Conditional Assent. — If two parties sign a memorandum of a contract upon the strength of a clear oral agreement that the writing is not to be binding until the happening of a given event, and the event never happens, there is no contract. (e) Where a party claims as the indorsee of a bill of exchange, it may be shown that the alleged indorser wrote his name on the bill, and delivered it to the alleged indorsee for a particular purpose, and on the understanding that it should not operate as an indorsement until the condition was fulfilled. (f) And if an oral agreement and an agreement in writing have been made, whether contemporaneously or not, upon two distinct independent matters, and the one does not conflict with or alter the other, both may stand; and the oral bargain may be enforced as well as the contract in writing. (g) When the contract is evidenced by letters and writings, it is for the court to interpret them, and determine whether they do or do not amount to a concluded contract; and if the judge leaves it to a jury to say what is the effect and meaning of written correspondence, there is a misdirection. (h)

Estoppel by Deed.¹ — The rule of law which stops a party from disputing or contradicting what he has affirmed or declared

¹ See Bigelow, Estoppel (3d ed.), 267–384.

(c) *Lewis v. Marshall*, 13 L. J. C. P. 193. *Wallis v. Littell*, 11 C. B. n. s. 369; 31 L. J. C. P. 100; *Davis v. Jones*, 17 C. B. 634.

(d) *Hutchison v. Bowker*, 5 M. & W. 542; *Neilson v. Harford*, 8 ib. 823; *Trueman v. Loder*, 11 Ad. & E. 599; *Sotilichos v. Kemp*, 18 L. J. Ex. 36; 3 Ex. 105. (f) *Bell v. Lord Ingestre*, 12 Q. B. 317; *Bannerman v. White*, 31 L. J. C. P. 28.

(e) *Pym v. Campbell*, 6 Ell. & Bl. 370; 25 L. J. Q. B. 277; *Rogers v. Hadley*, ante, p. * 202; *Lindley v. Lacey*, 34 L. J. C. P. 9; 17 C. B. n. s. 578; (g) *Lindley v. Lacey*, ante, p. * 201; *White v. Parkin*, 12 East, 578; *Harris v. Rickett*, ante, p. * 202; *Green v. Sadlington*, 7 Ell. & Bl. 503.

(h) *Cheveley v. Fuller*, 13 C. B. 122.

by deed (*ante*, p. * 19), does not, of course, extend to strangers to the contract. (*i*) A party to a deed, moreover, is not estopped in an action by another party not founded on the deed, and wholly collateral to it, from disputing the truth of certain facts recited and set forth in such deed. (*k*) When a recital in a deed is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But where it is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from construing the whole instrument. (*l*) As between the parties themselves, any averment of a fact made by [* 207] one of the parties * in the nature of a representation or warranty to the other may be contradicted and shown to be false by that other. (*m*) But the party who makes the averment is not permitted to contradict or dispute the fact recited. (*n*) If a lease, however, recites that the lessor is possessed of real or personal property, the lessee who executes and accepts such lease is estopped, during the continuance of his occupation, from denying the title and possession of his lessor at the time such lease was executed. (*o*)

A "grant" of an estate which would amount in equity to a representation, does not amount in law to a representation of a right to grant, that is, to an estoppel. There must be a strict recital, to the effect that the party has the right or title, in order by estoppel to bind him or persons claiming through him. (*p*)

Estoppels in Pais¹ arise "where a party by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, and alter his own previous position." A party who has so acted is said to be estopped before the country, and precluded from falsifying his own representation. (*q*) Conduct by negligence or

¹ See Bigelow, Estoppel (3d ed.) 387-580.

(*i*) *Rex v. Scammonden*, 3 T. 474. (*n*) *Oldham v. Langmead*, cited, 3
(*k*) *Carpenter v. Buller*, 8 M. & W. T. R. 439; *Humble v. Hunter*, 17 L. J.
209. Q. B. 350; 12 Q. B. 310.
(*l*) *Stroughill v. Buck*, 14 Q. B. 787; (*o*) *Beckett v. Bradley*, 8 Sc. N. R.
19 L. J. Q. B. 209; *Wiles v. Woodward*, 843; 7 M. & Gr. 995.
5 Ex. 557; 20 L. J. Ex. 264. (*p*) *General Finance Co. v. Liberator*
(*m*) *Hayne v. Maltby*, 3 T. R. 441; Soc., 10 Ch. D. 15.
Vin. Abr. Estoppel, M. 455. (*q*) *Pickard v. Sears*, 6 Ad. & E. 474;

omission to do an act is equally within the rule, but in order to create an estoppel it must be shown that the party setting it up has been induced by such negligence or omission to alter his position. (r) If one party dealing with another puts forth a sealed instrument as his deed, or if he represents it to be a binding obligation which he has himself executed, he cannot be heard in any court of law or equity to say, as against a party who has dealt with him on the faith of the correctness of the representation, that the instrument is not his deed, or that he never executed it, or that it is not a binding obligation. (s) If on the evidence it appears that two persons upon the negotiation of a mercantile security have assumed by common consent a certain fact, such as that a particular person is the drawer of a bill, or if by express agreement between them a bill is drawn and indorsed by procuration in the name of a fictitious or dead person, and the position of one of the parties has been altered on the faith of the arrangement, the other cannot afterwards be permitted to say that the bill was not drawn or indorsed as it purports to be. (t) * But where the defendant left his blank [* 208] acceptance in his table drawer, and the bill was stolen, and his name filled in as drawer of the bill, it was held he was not estopped. (u)

Contradictable Averments in Written Contracts not under Seal. — Although the express admissions of a party inserted in a contract are strong evidence against him, yet he is at liberty in certain cases, when the contract is not under seal, to prove that such admissions were mistaken or untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition, when the party is estopped, as we have seen, from disputing their truth with respect to that person and that transaction; (x) and this rule or principle of law is

M'Cance v. Lond. & N. W. Ry. Co., 34 L. J. Ex. 39; Freeman v. Cooke, 2 Exch. 654; Carr v. London & N. W. Ry., L. R. 10 C. P. 316; Citizens' Bank of Louisiana v. First National Bank of New Orleans, L. R. 6 H. L. 352; Williams v. Stern, 5 Q. B. D. 409.

(r) Freeman v. Cooke, *supra*; McKenzie v. Brit. Linen Co., 6 Ap. Cas. 82.

(s) Straffon, *Ex parte*, 22 L. J. Ch. 202.

(t) Ashpital v. Bryan, 32 L. J. Q. B. 95; 3 B. & S. 474.

(u) Baxendale v. Bennett, 3 Q. B. D. 525. See *per* Lindley, L. J., *In re* Cooper, 20 Ch. D. 611.

(x) Heane v. Rogers, 9 B. & C. 586.

applicable to mistakes in respect of legal liability, as well as in respect of matter of fact. (*y*) But a person is not estopped by a mere undertaking or contract to do something which does not involve a representation of some fact or state of things. (*z*) If a bill of exchange or promissory note purports on the face of it to be made for value received, it is competent to the parties to show that no value was received; (*a*) and if a receipt or acknowledgment of the payment of money has been given, oral evidence is admissible to contradict such receipt or acknowledgment, and rebut its legal operation as a discharge from liability. (*b*) So where a passenger who was injured by a railway accident accepted £400, and gave the company a receipt expressed to be in full discharge of his claims, it was held that the statement in the receipt could be rebutted by evidence that he did not receive the money in full satisfaction of all demands. (*s*)

(*y*) *Newton v. Liddiard*, 18 L. J. Q. B. 56. *Farrar v. Hutchinson*, 9 Ad. & E. 643; *Wallace v. Kelsall*, 7 M. & W. 273, 274;

(*z*) *Farmeloe v. Bain*, 1 C. P. D. 445. *Graves v. Key*, 3 B. & Ad. 313; *Bowes*

(*a*) *Foster v. Jolly*, 1 C. M. & R. 708; *v. Foster*, 2 H. & N. 779.

Ridout v. Bristow, 1 C. & J. 231.

(*b*) *Lampon v. Corke*, 5 B. & Ald. 611; *Skaife v. Jackson*, 3 B. & C. 423; (*c*) *Lee v. Lancashire & Yorkshire Railway Co.*, L. R. 6 Ch. 527.

THE LAW OF PARTICULAR CONTRACTS.

CHAPTER I.

THE CONTRACT OF LETTING.

SECTION I.

LANDLORD AND TENANT.

Leases.¹—A lease is a contract whereby the temporary use and possession of a house or land are granted by the owner to

¹ For general accounts of the contract of lease, see Taylor, Land. & Ten. (7th ed.) particularly c. 5, The Instrument of Demise, and c. 4, The Contracting Parties; Wood, Land. & Ten. (1881) especially c. 25, Of Leases in General, c. 20, Of Leases between Particular Individuals, and c. 21, Of Leases under Powers; Pars. Contr. 499; Story, Contr. (5th ed.) sect. 120; U. S. Dig. tit. *Landlord and Tenant*, II.; also Jackson & Gross, Land. & Ten. in Pennsylvania (1882) and McAdam, Land. & Ten. (2d ed. 1882); Mart. Conv. tit. II.; article, 24 Alb. L. J. 364, 16 Am. L. Rev. 16; 6 South. L. Rev. 902; Laws. U. S. & C. 267-273.

Mining leases, privileges, and contracts relating to them, Wood, Land. & T. 99, 304, 654; Grubb v. Bayard, 2 Wall. jr. 81; Beatty v. Gregory, 17 Iowa, 109; New Jersey Zinc Co. v. New Jersey Franklinite Co., 13 N. J. Eq. 322; Coleman v. Blewett, 43 Pa. St. 176; Grove v. Hodges, 55 Pa. St. 504; Gillett v. Treganza, 6 Wis. 343; Hill v. Taylor, 22 Cal. 191; Real Del Monte Min. Co. v. Pond, &c. Min. Co., 23 Cal. 82; Gatewood v. McLaughlin, ib. 178; Antoine Co. v. Ridge Co., ib. 219; Patterson v. Keystone, &c. Co., ib. 575; Richardson v. McNulty, 24 Cal. 339; Freer v. Stotenbur, 36 Barb. 641; McBee v. Loftis, 1 Strobb. Eq. 90; McKnight v. Kreutz, 51 Pa. St. 232; Draper v. Douglass, 23 Cal. 347; Upton v. Brazier, 17 Iowa, 153; Chapman v. Briggs Iron Co., 6 Gray, 330; Titus v. Minnesota Min. Co., 8 Mich. 183; Desloge v. Pearce, 38 Mo. 588; Suffern v. Butler, 21 N. J. Eq. 410; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; Massot v. Moses, 3 S. C. 168; Barker v. Dale, 3 Pittsb. 190; Meyers v. Farquharson, 46 Cal. 190; Knight v. Indiana Coal, &c. Co., 47 Ind. 105; Ganter v. Atkinson, 35 Wis. 48; Townsend v. Peaslee, ib. 383; Harkness v. Burton, 39 Iowa, 101; Sobey v. Thomas, 39 Wis. 317; Allison's Appeal, 77 Pa. St. 221; Seavers v. Cleary, 75 Ill. 349; Ger-

another for a stipulated or implied remuneration. He who grants the possession and use of the property to be enjoyed for hire is

rens v. Huhn, &c. Min. Co., 10 Nev. 137; *Freck v. Locust Min. Coal Co.*, 86 Pa. St. 318; *Mine Hill, &c. R. R. Co. v. Lippincott*, ib. 468; *Prevost v. Gorrell*, 11 Phila. 263. See further, *Blanch. & W. Lead. Cas. Mines*; U. S. Dig. tit. *Mines*.

Coal-mining leases in particular. *Watson Coal, &c. Co. v. Casteel*, 73 Ind. 296; *Austin v. Huntsville Coal, &c. Co.*, 72 Mo. 535; *Harlan v. Lehigh Coal, &c. Co.*, 35 Pa. St. 287; *Powell v. Burroughs*, 54 ib. 329; *Griffin v. Fellows*, 81 * Pa. St. 114; *Kemble Coal, &c. Co. v. Scott*, 90 Pa. St. 332; *McDowell v. Hendrix*, 67 Ind. 513; *McLean County Coal Co. v. Lennon*, 91 Ill. 561; *Wilms v. Jess*, 94 Ill. 464; *Bannon v. Mitchell*, 6 Ill. App. 17; *Livingston v. Moingona Coal Co.*, 49 Iowa, 369; *Cook v. Andrews*, 36 Ohio St. 174; *List v. Cotts*, 4 W. Va. 543; *Williams v. Summers*, 45 Ind. 532; *Trout v. McDonald*, 83 Pa. St. 144; *Randolph v. Halden*, 44 Iowa, 327; *Scranton v. Phillips*, 94 Pa. St. 15. That the general principles settled as to these apply also to leases with the right of quarrying, or of digging clay, see *Sheets v. Allen*, 89 Pa. St. 47; *Stewart v. Munford*, 91 Ill. 58; *Yandes v. Wright*, 66 Ind. 319.

Renewals, Wood, Land. & Ten. sect. 416; Taylor, L. & T. sect. 332; *Elevator Co. v. Brown*, 36 Ohio St. 660; *Insurance, &c. Co. v. National Bank*, 5 Mo. App. 333; *Bruce v. Fulton Nat. Bank*, 79 N. Y. 154; s. c. 35 Am. Rep. 505; *Behrman v. Barto*, 54 Cal. 131; *Flint v. Pearce*, 11 R. I. 576; *Neiswanger v. Squier*, 73 Mo. 192. Tenant holding over without new agreement may be held as on a renewal at same rent. *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151.

Farming on shares is discussed in article 24 Alb. L. J. 504; notes by A. C. Freeman to *Demott v. Hagerman*, 8 Cow. 220; 18 Am. Dec. 443; *Bailey v. Fillebrown*, 9 Mo. 12; 23 Am. Dec. 529; *Putnam v. Wise*, 1 Hill (N. Y.), 234; 37 Am. Dec. 309; U. S. Dig. tit. *Landlord and Tenant*, VI.

Whether under various forms of agreements for farming on shares the landowner and the cultivator are to be regarded as landlord and tenant, tenants in common, employer and employee, or otherwise, see *Evans v. English*, 61 Ala. 416; *Chase v. McDonnell*, 24 Ill. 236; *Hoskins v. Rhodes*, 1 Gill & J. 266; *Guest v. Opdyke*, 31 N. J. L. 552; *Taylor v. Bradley*, 4 Abb. App. Dec. 363; *Doty v. Heth*, 52 Miss. 530; *Haywood v. Rogers*, 73 N. C. 320; *Neal v. Bellamy*, ib. 384.

An agreement between the owner of land and another person, to the effect that the latter shall cultivate the land and pay to the former a specified portion of the produce, may create a tenancy in common in the crops, but is not necessarily inconsistent with the relation of landlord and tenant. *Swanner v. Swanner*, 50 Ala. 66; *Alwood v. Ruckman*, 21 Ill. 200; see *Wentworth v. Portsmouth, &c. R. R.*, 55 N. H. 540.

The question whether an agreement for cultivation upon shares constitutes a joint tenancy in the crops, or the relation of landlord and tenant, depends upon the intention of the parties (*Dixon v. Nicolls*, 39 Ill. 372; *Johnson v. Hoffman*, 53 Mo. 504); and their having used such words as "leases, rents, and lets" in their agreement will indicate an intention to constitute the relation of landlord and tenant (*Johnson v. Hoffman*, *supra*; see *Griswold v. Cook*, 46 Conn. 198).

The difference between a tenant and a cropper is that a tenant has an estate in the land for the term, and the title to the crop while growing is in him. The landlord's share does not vest in the latter until division; but the cropper has possession as a servant only until his share is divided off to him by the landlord. *Harrison v. Ricks*, 71 N. C. 7.

A contract between the owner and his laborers for the cultivation of a crop on

called the lessor or landlord; and he who has the enjoyment of it, paying the rent or hire, is called the lessee or tenant. In the

shares, creates a tenancy in common in the crop, and not the relation of landlord and tenant. *Smith v. Rice*, 56 Ala. 417; *Brown v. Coats*, ib. 439.

A contract between the owner of a farm and another person for the one to furnish the land, seed, and utensils for raising a crop, and the other the labor therefor, but without the right of possession of the premises, constitutes between the parties the relation of tenants in common of the crop, not that of landlord and tenant. *Creel v. Kirkham*, 47 Ill. 344; *State v. Jewell*, 34 N. J. L. 259.

Letting land on shares for a single crop does not amount to a lease of the land. *Bradish v. Schenck*, 8 Johns. 151; *Warner v. Hoisington*, 42 Vt. 94.

An agreement to sow certain crops and render a certain proportion of the crop for the use of the land, is an agreement to work on shares, not a lease. *Caswell v. Districh*, 15 Wend. 379.

If one be hired to work land, receiving for his compensation part of the produce, he is a cropper, not a tenant. He has no interest in the land, but receives his share as the price of his labor. *Adams v. McKesson*, 53 Pa. St. 81.

The case of the cropper is rather a mode of paying wages than a tenancy. The title to the crop subject to the wages is in the owner of the land, the cropper only having a right to go on the land to plant, work, and gather the crop. *Appling v. Odom*, 46 Ga. 583. See also *Huff v. Watkins*, 15 S. C. 82.

Letting land to a person for one year to cultivate it on shares, makes him a tenant, and not a mere laborer or servant. *Jackson v. Brownell*, 1 Johns. 267.

Construction and validity of various agreements for cultivating land on shares. *Herskell v. Bushnell*, 37 Conn. 36; *Griswold v. Cook*, 46 Conn. 198; *Silvers v. Chitwood*, 59 Ill. 193; *Clem v. Martin*, 34 Ind. 341; *Rees v. Baker*, 4 Greene, 461; *Hurt v. Woodland*, 24 Md. 393, 417; *Shearer v. Jewett*, 14 Pick. 232; *Moore v. Mohney*, 1 Mich. N. P. 143; *Brown v. Lincoln*, 47 N. H. 468; *Harrower v. Heath*, 19 Barb. 331; *Wilber v. Sisson*, 53 Barb. 258; *Hobbs v. Wetherwax*, 38 How. Pr. 385; *Armstrong v. Bicknell*, 2 Lans. 216; *Parsell v. Stryker*, 41 N. Y. 480; *Harrison v. Ricks*, 71 N. C. 7; *Gazley v. Wayne*, 36 Tex. 689; *Brown v. Burrington*, 36 Vt. 40; *Mason v. Clifford*, 4 Fed. Rep. 177; *State v. Copeland*, 86 N. C. 691.

Relative rights of the parties, and how they may be enforced, either by entering and taking possession, or by various judicial remedies. *Robinson v. Kruse*, 29 Ark. 575; *Herskell v. Bushnell*, 37 Conn. 36; *McCook v. Cousins*, 39 Ga. 125; *Davis v. Brocklebank*, 9 N. H. 73; *Hatchell v. Kimbrough*, 4 Jones L. 163; *Ware v. Simmons*, 55 Ga. 94; *Williams v. Cleaver*, 4 Houst. 453; *Wilcoxon v. Bowles*, 1 La. Ann. 230; *Fiquet v. Allison*, 12 Mich. 328; *Walker v. Fitts*, 24 Pick. 191; *Moore v. Ross*, 11 N. H. 547; *La Point v. Scott*, 36 Vt. 603; *Smalley v. Corliss*, 37 Vt. 486; *Dunning v. South*, 62 Ill. 175; *Secrest v. Stivers*, 35 Iowa, 580; *Becnel v. Becnel*, 23 La. Ann. 150; *Cornell v. Dean*, 105 Mass. 435; *Williams v. Bemis*, 108 Mass. 91; *Taylor v. Bradley*, 4 Abb. App. Dec. 363; *Fordyce v. Hathorn*, 57 Mo. 120; *Varner v. Spencer*, 72 N. C. 381; *Tucker v. Hasson*, 32 Tex. 536; *Beckwith v. Carroll*, 56 Ala. 12; *Wheat v. Watson*, 57 Ala. 581; *Goeing v. Outhouse*, 95 Ill. 346; *Vanderslice v. Mumma*, 1 Ill. App. 434; *Babley v. Vyse*, 48 Iowa, 481; *Wells v. Hollenbeck*, 37 Mich. 504; *Adams v. Leip*, 71 Mo. 597; *Enley v. Nowlin*, 1 Baxt. 163; *Patterson v. Hawkins*, 3 Lea, 483.

In farming on shares, the tenant, as against the landlord, is entitled to possession of the whole crop while it is growing, and may recover damages from the landlord if cattle of the latter break into the field and injure the crop. *Frout v. Hardin*, 56 Ind. 165.

Roman law the former was called "*locator*," the latter "*conductor*;" and the contract itself "*locatio rei*." In the French law it is termed "*bail à loyer*," or a bailment for hire; the lessor is called the "*bailleur*," or bailor, and the hirer the "*preneur*," or "*locataire*." (a) If the land or realty is granted by deed to be enjoyed for a term, without any payment of rent by the grantee, the grant amounts to a *COMMODATUM*, or gratuitous loan of the use of the land, and does not create a contract of letting and hiring between the parties. On the other hand, a demise for a term

Where a lease is made by which the rent is to be paid in a part of the crop, the contract is executory, and the title to the crop made is in the lessee, until the lessor's part is separated and allotted to him; and, therefore, before that time the lessor has no right to take possession of any part of the crop without the consent of the lessee. *Ross v. Swaringer*, 9 Ired. L. 481.

Where land is leased to a cropper for a year on shares, the landlord has a lien on the growing crop, and no part of the crop can be removed by the tenant until the share of the landlord is set off. *Case v. Hart*, 11 Ohio, 364.

The lessor of a farm on shares, with a proviso that all crops shall remain under his control till sold, has the entire property till they are sold, and then a lien on the proceeds till the lessee's covenant is performed. *Esdon v. Colburn*, 28 Vt. 631.

A contract for working a farm on shares does not amount to a lease of the land. It does not divest the owner of his possession, nor give the laborer anything more than a right to enter for the purpose of the cultivation agreed for. After the crop is severed and the laborer has deposited the owner's share in one portion of the land, his authority to enter upon that portion ceases, and any subsequent entry and interference with such portion is a trespass. *Warner v. Hoisington*, 42 Vt. 94.

Determination of claims of third persons, — *e. g.* creditors of landowner or cultivator, or purchasers from either, — to the crop or the land. *Leland v. Sprague*, 28 Vt. 746; *Upham v. Dodd*, 24 Ark. 545; *Ream v. Harnish*, 45 Pa. St. 376; *Tinker v. Cobb*, 39 Vt. 483; *Lathrop v. Rogers*, 1 Ind. 554; *Wilson v. Walker*, 46 Ga. 319; *Lufkin v. Preston*, 52 Iowa, 235; *Atkins v. Womeldorf*, 53 Iowa, 150.

One who hires land to raise a crop upon it, on an agreement that the crop is to be the property of the landlord, but that after he has taken out a certain portion by way of compensation for use of land, and for certain supplies, the remainder shall belong to the tenant, has no right or interest in the crop before division which he can sell or mortgage. *Ponder v. Rhea*, 32 Ark. 435.

Where land is leased upon condition that a third of the crop shall be given to the owner in payment of rent, the owner acquires no title to the part of the crop reserved for rent until it is set apart for him by the tenant. Rent thus reserved, and not accrued, passes with a conveyance; hence a purchaser of the land at a judicial sale becomes entitled thereto. *Townsend v. Isenberger*, 45 Iowa, 670.

Where land is leased for a share of the crops raised, to be divided after gathering, the title to the whole will be that of the tenant until the division and delivery. Upon levy thereon of an execution against the tenant before the gathering, an agreement between him and the landlord that the latter shall receive his share in the field, will not be allowed to defeat the levy. *Sargent v. Courier*, 66 Ill. 245.

(a) *Encyc. du Droit*, tit. *Bail*.

of years, if it is by deed, and for the whole term which the lessor has in the premises, operates as an assignment. (*b*)

Agreements for Leases. — We have already seen that all agreements for leases must be authenticated by some note or memorandum, signed according to the provisions of the statute of frauds (*ante*, p.*159). We have also seen that all leases exceeding three years in duration, required by the statute of frauds to be evidenced * by a signed writing, must now be au- [*210] thenticated by deed (*ante*, p.*179). Every lease, therefore, in writing, not under seal, for a term exceeding three years in duration, amounts only to an agreement to grant a lease for the term specified. (*c*) But if an oral agreement for a lease has been entered into, and the intended lessee, relying on the promise of the lessor to grant the lease, takes possession of the land and expends money in building, draining, and improving, and there is, therefore, a part performance of the contract, the court will enforce the oral contract, and compel the lessor to grant the lease agreed upon, on the ground that, by refusing to grant the lease and give the party possession in execution of the contract, he is guilty of a direct fraud, which ought to be relieved against. (*d*) Part performance by a sub-lessee is equivalent to part performance by the lessee. (*e*) When a party has actually been let into possession under an oral contract of demise, and rent has been paid to and received by the landlord, a tenancy from year to year between the parties arises by implication of law (*post*, p.*217). From every contract to grant a lease there is an implied agreement by the party contracting to grant the lease that he has a good right and title so to do. (*f*) There may be an independent and collateral agreement to hold land at a rent which, although it does not operate as a demise without taking possession, yet is a binding undertaking to pay the amount of the rent. (*g*)

(*b*) *Parmenter v. Webber*, 8 Taunt. 593; *Beardman v. Wilson*, L. R. 4 C. P. 57; 38 L. J. C. P. 91.

(*c*) *Bond v. Rosling*, *Parker v. Taswell*, *Tidey v. Mollett*, *ante*, p.*179; *Burton v. Reeve*, 16 M. & W. 307; 16 L. J. Ex. 85; *Rollason v. Leon*, 7 H. & N. 73; 31 L. J. Ex. 96.

(*d*) *Morphett v. Jones*, 1 Swanst.

172; *Gregory v. Mighell*, 18 Ves. 328; *Mundy v. Joliffe*, 5 Myl. & Cr. 167; *Parker v. Smith*, 1 Coll. Ch. C. 608.

(*e*) *Williams v. Evans*, L. R. 19 Eq. 547.

(*f*) *Stranks v. St. John*, L. R. 2 C. P. 376; 36 L. J. C. P. 118.

(*g*) *Adams v. Haggart*, 4 Q. B. D. 480, C. A.

Present Demises.¹ — No precise words or technical form of language are requisite to constitute a present demise. An estate or term of years in the land may be created and vested in a third party by giving him a license to enjoy a house, or making an agreement with him that he “shall reside” therein, provided some certain rent or specified service is reserved, or something is given as the consideration of the contract, and possession is given and accepted under the contract. (*h*) If there are any words showing a present intention that one is to give and the other to have possession for a determinate term, a tenancy is created; and this intention may be manifested by expressions contained in a series of letters, as well as by the formal words of a single instrument. (*i*) And on the other hand, [* 211] although *there be precise and formal words of present demise, yet, if there appears from the face of the entire contract a contrary intention, the instrument will be considered only an agreement for a future lease, and will not operate as a present demise. (*k*)

It is a rule of law that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and profits of the land, and the other come into them for such a determinate time for a certain hire or rent, such words, whether they run in the form of an assignment or of a license, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose. (*l*) A lease may be made either for life, or for years, or at will; and a contract for letting and hiring of land will, if it cannot operate as an assignment, be supported as a

¹ The fact that one to whom the owner has verbally and unambiguously agreed to give a written lease of a building, to commence in future, has acquired possession, will not convert the agreement into a present lease. *Potter v. Mercer*, 53 Cal. 667.

(*h*) Co. Litt. 45 b; Bac. Ab. *Leases* v. Lloyd, 12 M. & W. 478; *Doe v. Clark*, (K); *Right v. Proctor*, 4 Burr. 2209. 7 Q. B. 211; *Taylor v. Caldwell*, 3 B.

(*i*) *Chapman v. Bluck*, 5 Sc. 531; 4 & S. 826.
Bing. N. C. 187; *Jones v. Reynolds*, 1 (*l*) Bac. Abr. *Leases* (K.); *Shep.*
Q. B. 506. Touch. c. 14, 272; Bro. Abr. (*Lease*),

(*k*) *Morgan v. Bissell*, 3 Taunt. 72; pl. 60; *Cottee v. Richardson*, 7 Exch.
Doe v. Powell, 8 Sc. N. R. 687; *Gore* 143.

lease, although it was intended to pass all the lessor's interest. (*m*) Whenever the house or land of one man has been occupied and used by another, the *prima facie* presumption is that the use and occupation are to be paid for; and the landlord is entitled to maintain an action to recover a reasonable hire and reward for the use of the land, unless the tenant can show that he entered into possession of the property under circumstances fairly leading to an opposite conclusion. A landlord, on the other hand, who has permitted a tenant to occupy property, and has received rent from the latter for such use and occupation, will be bound by his own acts, and cannot afterwards treat such tenant as a trespasser and turn him out of possession without a proper notice to quit. But if the tenant is a pauper who has been provided with a dwelling-house by the parish, or an old servant who has been accommodated with a cottage and garden by his master, or the son or other near relation of the owner, the possession and occupation do not raise a presumption of a contract of letting and hiring between the parties. The transaction amounts only to a *commodatum*, or gratuitous loan of the property for use. The possession of the tenant is the possession of the landlord or owner; and the former may at any time be removed at the will and pleasure of the latter. (*n*)

Proof of the Terms of Holding.—If a tenancy is, actually created by entry on the land and payment of rent, the terms of the tenancy may be proved by oral testimony. Where land was *about to be let, and printed papers of the [* 212] terms of holding were distributed among parties, who assented verbally to the printed terms, and subsequently became tenants, it was held that a witness might look at the printed paper to refresh his memory when he was asked to prove the terms of the holding from recollection. (*o*)

Lease by Estoppel.¹—We have already seen (*oo*) that no man

¹ See Bigelow, Estoppel (3d ed. 1882), 327-332; *ib.* 390; Herman, Estoppel, 317, 358; U. S. Dig. tit. *Landlord and Tenant*, sects. 206-370; tit. *Estoppel*, sect. 599.

The rule of estoppel extends only to rights reserved in the original lease. A

(*m*) *Pollock v. Stacy*, 9 Q. B. 1035.

(*o*) *Lord Bolton v. Tomlin*, 5 Ad. & E.

(*n*) *Bertie v. Beaumont*, 16 East, 33; 856.

Hunt v. Colson, 3 M. & Sc. 791; *Doe v.*

(*oo*) *Ante*, p. * 206.

Stanton, 2 B. & Ald. 373.

is permitted to allege or prove anything in contradiction or contravention of his own deed. Where, therefore, a man grants a lease under seal, he is not permitted to avoid his own grant by proving that he had no interest in the demised premises, unless he is a trustee for the public, deriving his authority from an act of parliament. (*p*) As between him and his lessee, the lease operates by way of estoppel. "And if one makes a lease for years, by indenture, of lands wherein he hath nothing at the time of such lease made, and after purchases those very lands, this shall make good and unavoidable his lease, as well as if he had been in the actual possession and seisin thereof at the time of such lease made; because he, having by indenture expressly demised those lands, is, by his own act, estopped and concluded to say he did not demise them; and if he cannot aver that he did not demise them, then there is nothing to take off or impeach the validity of the indenture, which expressly affirms that he did demise them; and consequently the lessee may take advantage thereof, whenever the lessor comes to such an estate in those lands as is capable to sustain and support that lease." (*q*) And when the estoppel becomes good in point of interest, the heir of the lessor, and all persons claiming under the lessor by assignment or otherwise, are bound by the estoppel. (*r*) Upon the execution of the lease there is created, in contemplation of law, a reversion in fee simple by estoppel in the lessor, which tenant claiming under an oral lease from a tenant at will is not estopped from maintaining an action of tort in the nature of trespass for his eviction from the tenement by one claiming under a subsequent written lease from such tenant at will. *Hilbourne v. Fogg*, 99 Mass. 11.

A lessee of the heirs at law, — *Held*, to be estopped from denying their title by setting up a deed from their intestate to a third party, of which he was ignorant when they leased to him, such party having merely notified him no longer to pay rent to them, and he not having attorned, but alleged to them inability as the reason of non-payment. *Hawes v. Shaw*, 100 Mass. 187.

Where a person conveyed land to his wife through the medium of a trustee, claiming that the title was to be held in trust for him, and afterwards accepted a life-lease of a portion of it, and subsequently brought an action to obtain a re-conveyance of the land, — *Held*, that the acceptance of the lease was a recognition of the wife's title, which estopped the husband from setting up any claim to the residue of the premises. *Courvoisier v. Bouvier*, 3 Neb. 55.

(*p*) *Fairtitle v. Gilbert*, 2 T. R. 169. *Goodtitle v. Morse*, 3 T. R. 371; 2

(*q*) *Bac. Abr. Lease* (O). *Wms. Saund.* 418 a; *Doe v. Thompson*, 9 Q. B. 1043.

(*r*) *Trevivan v. Lawrence*, 1 Salk. 276; 2 *Smith's L. C.*, 5th ed., 640;

passes by descent to his heir, and by purchase to an assignee or devisee. So long, therefore, as a lessee enjoys everything which his lease purports to grant, he has no concern with the title of the lessor or the heir or assignee of the lessor. (s) If, however, it appears by the recitals of the lease that the lessor had no interest in the land, or that he had only an equitable interest, at the time of the demise, there will be no estoppel. (t) The lessee is also in like manner estopped from denying the lessor's title to grant the * lease, and setting up such want [*213] of title as an answer to an action for the rent by the lessor or his assignee; (u) for the law will not suffer the tenant to abuse a possession gained by the act and confidence of the landlord, and turn it to the injury of the latter. (x) But he may show that the lessor's title has expired; (y) and if he is evicted and deprived of the use and enjoyment of the demised premises by some person claiming by title paramount, the eviction is pleadable in bar to a demand of the rent; but it must be an actual, and not a mere constructive, eviction. (z) An attornment to a receiver appointed by the court constitutes a tenancy by estoppel between the tenant and the receiver, which the court applies for the purpose of collecting the rents till a decree can be pronounced, taking care that the tenant shall be protected both while the receiver continues to act and when he is withdrawn. (a)

Demises by Agents.—If the steward of a person not named says to an occupier, "I let you into possession in the name of the landlord," he may afterwards show by parol evidence who that landlord is; and it is not open to the tenant to dispute the title of the unnamed landlord. (b) Where an agreement was

(s) *Cuthbertson v. Irving*, 4 H. & N. 758; 6 H. & N. 135; 28 L. J. Ex. 306; 29 ib. 485. *Phipps v. Sculthorpe*, 1 B. & Ald. 50; *Levy v. Lewis*, 28 L. J. C. P. 144; 30 L. J. C. P. 142.

(t) *Pargeter v. Harris*, 7 Q. B. 708; 15 L. J. Q. B. 117; *Greenaway v. Hart*, 14 C. B. 340; but see *Morton v. Woods*, L. R. 3 Q. B. 658; 4 Q. B. 293; 37 L. J. Q. B. 242; 38 ib. 81; *Ex parte Punnett*, 16 Ch. D. 226. (y) *Claridge v. Mackenzie*, 4 Sc. N. R. 811; *Doe v. Skirrow*, 7 Ad. & E. 157; *Downs v. Cooper*, 2 Q. B. 263.

(z) *Delaney v. Fox*, 2 C. B. N. S. 768.

(a) *Evans v. Mathias*, 7 Ell. & Bl. 602.

(u) *Cuthbertson v. Irving*, 6 H. & N. 135; 29 L. J. Ex. 485. (b) *Tindal, C. J., Fleming v. Gooding*, 10 Bing. 550.

(x) *Dolby v. Iles*, 11 Ad. & E. 335;

entered into by an agent in his own name for the letting of a house, and the rent was made payable to the agent in his own name, but at the commencement of the agreement he described himself as agent for the proprietors, it was held that he might show who were the proprietors at the time the agreement was signed, and that the tenant was estopped from disputing their title. (c) A land-agent or collector of rents has, as such, no implied authority to grant leases. (d)

Ascertainment and Identification of the Subject-Matter of the Demise.¹ — It may always be shown by parol evidence what was, and what was not, parcel of the demise, and intended to pass to the lessee by the deed. (c) If a general and comprehensive term and description be used in a lease, all the things usually comprehended under such general term and description will pass to the lessee, unless the surrounding circumstances and the relative situation and interests of the contracting parties plainly show that such could not have been their intention.

[*214] By parol evidence of *extrinsic circumstances a general and comprehensive term may be controlled and restricted so as to pass much less than is ordinarily comprised under the common legal acceptance of the term, and, on the other hand, a particular and limited term and description may be extended and enlarged so as to comprehend and include much more than it generally comprises, in order to effectuate the plain and obvious meaning of the parties.

A lessor demised a messuage and piece of ground with the appurtenances to the defendant; and the latter, after he had taken possession, laid claim to a cellar under the messuage, on the ground that it had passed to him under the general description contained in his lease; and it was held that the lessor might show, through the medium of parol evidence, that at the time of the demise and previous thereto, the cellar had been severed from the messuage, and used as a wine cellar by a wine merchant, under a separate and distinct lease, at a separate rent,

¹ See notes, *ante*, p. * 209 and p. * 198.

(c) Per Mellor, J., *Prescott v. Ingram*, June 23d, 1864; *Fleming v. Gooding*, 4 M. & Sc. 455.

(d) *Collen v. Gardner*, 21 Beav. 540.

(c) *Skipwith v. Green*, 8 Mod. 311.

which was known to the defendant at the time of his acceptance of the lease, and therefore that it could not have been the intention of the parties that the cellar so occupied by a third party should pass to him under the general description of the messuage and ground thereunto adjoining. (*f*) Under the word "cottage" or "house," on the other hand, land may pass, if it can be shown that the land has for a length of time been used and occupied with the cottage or house at one entire rent, and has been commonly reputed to be part and parcel thereof. "Being found to be all one, it passeth well by the lease." Divers things that by continual enjoyment with the principal thing demised have by common reputation been deemed to belong to it, may well pass as part and parcel of the principal thing demised, if extrinsic circumstances show that such must have been the intention of the parties. (*g*) "Wherever there is a sufficient description to ascertain the thing demised, a part of the description which is inaccurate may be rejected." (*h*)

Things appurtenant. — When a man grants a thing to be used for hire, he grants it with all such appurtenances and accompaniments as properly belong to it, and with all such rights of way as are necessary to enable the hirer to have that use and enjoyment of the thing demised for which the hire is agreed to be paid. (*i*) But a grant of realty, to be used and enjoyed by the grantee for a term for rent or hire, transfers to the latter * a right only, as we shall presently see, to use [*215] the subject-matter of the demise in the way in which it has been previously used and enjoyed. Many things, therefore, which pass by a grant in fee, so as to give the grantee an absolute dominion over them, do not pass by a lease so as to give the lessee a right to use and enjoy them, as part of the proceeds and profits of the subject-matter of the demise. The lessee, for example, has a right only to the casual profits of trees; he has no

(*f*) *Doe v. Burt*, 1 T. R. 703; *Bryan v. Wethered*, 3 Cro. 18; *Kerslake v. White*, 2 Stark. 508; *Martyr v. Lawrence*, 10 Jur. N. S. 859.

(*g*) *Gennings v. Lake*, 3 Cro. 169; *Ongley v. Chambers*, 1 Bing. 496-499. But see *Jones v. Whelan*, 16 Ir. C. L. R. 495.

(*h*) *Doe v. Galloway*, 5 B. & Ad. 49; 2 N. & M. 241.

(*i*) *Morris v. Edgington*, 3 Taunt. 31; *Kooystra v. Lucas*, 5 B. & Ald. 834; *Harding v. Wilson*, 3 D. & R. 290; 2 B. & C. 96; *Maitland v. Mackinnon*, 1 H. & C. 607; 32 L. J. Ex. 49.

right to cut them down and sever them from the freehold and inheritance. He has a right to the profits of mines and quarries opened at the time of the demise, but has no right to open fresh mines and quarries where none before existed.

Commencement and Duration of Leases.¹ — Leases for lives, as well as leases for terms of years, may now be made to commence from a day that is passed, or from a day to come, as well as from the day of the making of the lease. If the lease is limited to commence “from the date” or “from the day of the date,” the words are either inclusive or exclusive, according to the context and subject-matter of the written instrument and the apparent intention of the contracting parties. (*k*) A lease “from the day of the date” and “from henceforth” is the same thing; if, therefore, a lease be dated the 1st of December, and be granted to commence “from henceforth,” and be sealed and delivered on the 12th of December, the lease commences in contemplation of law from the 1st of December. (*l*) If in the case of a present demise no time is mentioned for the commencement of the lease, or if the date is an impossible date, the term will be deemed to begin from the day of the delivery of the deed or of the making of the demise, if extrinsic circumstances do not rebut such a presumption. (*m*) But it is otherwise in the case of an executory demise. (*mm*) The commencement of the term is necessarily controlled and regulated by extrinsic circumstances as well as by the express terms and language of the deed. Where a lease was dated the 25th of March, 1783, and the term was granted to commence “from the 25th of March now last past,” and it was proved that the deed was not executed until some time after the day on which it was dated, it was held that the term commenced on the 25th of March, 1783, and not on the 25th of March, 1782. (*n*) If the land is demised

¹ See Wood, Land. & Ten. 110; Taylor, Land. & Ten.; McAdam, Land. & Ten.; U. S. Dig. tit. *Landlord and Tenant*, sect. 927.

(*k*) Pugh v. Leeds, Duke of, 2 Cowp. 714; and see *ante*, p. *194.

(*l*) Llewelyn v. Williams, Cro. Jac. 258.

(*m*) Styles v. Wardle, 4 B. & C. 908; 7 D. & R. 507; Higham v. Cookes, 4 Leon. 144; Co. Litt. 46 b.

(*mm*) Marshall v. Berridge, 19 Ch. D. 233; overruling Jaques v. Millar, 6

Ch. D. 153.

(*n*) Steele v. Mart, 6 D. & R. 392;

4 B. & C. 272.

“for a year, and so on from year to year,” or “for a year * and afterwards from year to year,” this is a lease for [* 216] two years certain at least. (*o*) But if the demise is from year to year so long as both parties please, it is a lease only for a year certain, and is determinable at the end of the first as well as of any subsequent year. (*p*) If the demise is for “one year certain” and six months’ notice afterwards, the lease is only a lease for a year. (*q*) If the land is expressed to be demised for years generally, the lease is said to be good for two years at the least. (*r*) A house and land were demised for the term of six months, and so on from six months to six months, until one of the parties shall give the other six calendar months’ notice of his intention to determine the tenancy, and it was held that this was a lease for one year at least. (*s*)

If a lease is granted for seven, fourteen, or twenty-one years, and the lessee enters and takes possession of the demised premises, the legal construction of the lease is that the lessee is entitled at his option to take that term which is most beneficial to himself. The lessee, therefore, has the option, at the expiration of the first seven years, of continuing the lease on for another seven years, and after that term has expired for the full period of twenty-one years, if he chooses so to do, the courts leaning in favor of that construction which is the most favorable to the lessee. (*t*) Where the lessor agreed not to raise the rent nor turn the tenant out of possession so long as the rent was duly paid quarterly, it was held that this operated as an agreement for a tenancy from year to year. If in a lease under seal the lessor covenants not to raise the rent nor turn out the tenant so long as the rent is duly paid, this is a lease for life. If the undertaking is contained in a lease not under seal, it operates only as a simple contract or agreement, for a breach of which the tenant may recover damages from the lessor; but it does not prevent the latter from ejecting the tenant after the ordi-

(*o*) Bac. Abr. *Leases* (L), 838; Legg 573; Jones v. Nixon, 1 H. & C. 48; 31 v. Strudwick, 2 Salk. 414; 18 Hen. VIII. L. J. C. P. 66.

15 b; Denn v. Cartwright, 4 East, 29; (*r*) Bro. Abr. Lease, 13; 6 Co. 35, 36.

Doe v. Green, 9 Ad. & E. 658; 1 P. & D. (*s*) Reg. v. Chawton, 1 Q. B. 247.

454. (*t*) Dann v. Spurrier, 3 B. & P. 404;

(*p*) Doe v. Smaridge, 7 Q. B. 557. Doe v. Dixon, 9 East, 15; Goodright v.

(*q*) Thompson v. Maberly, 2 Campb. Richardson, 3 T. R. 462.

nary notice to quit. (*u*) If the full extent and duration of the term are uncertain, but there is a certainty for some specific portion of time, the lease will be good for such term or portion of time, and void as to the residue. (*x*) If no time at all is mentioned for the duration of the term, and there has been no entry upon the land nor payment of rent, there is no lease at [*217] all; but if the lessee *has actually entered and taken possession, the duration of the term of hiring will be regulated by the nature of the subject-matter of the demise, the times limited for the payment of the rent, and the custom of the country where the property is situate.

Leases from Year to Year.¹⁵—In the case of a general demise of farms or lands, no term or time of holding being mentioned, the presumption is by custom in favor of a yearly hiring (*y*) in the absence of an express limitation of the term. If a corn-field or an orchard is demised at a customary and ordinary rent, the hiring will be deemed to be for a year, and so on from year to year in order that the tenant may reap the harvest and gather the fruits and produce of the soil when they come to perfection, as the rent is reasonably presumed to be paid for the enjoyment thereof, and not for the barren occupation of the land itself. “If the produce of the demised lands requires two years to come to perfection, as if it be liquorice, madder, &c., a general holding will, it seems, enure as a tenancy from two years to two years, and cannot be determined by a notice to quit at the end of the first or third year.” (*z*) Where lands were demised to J H, his heirs, executors, and assigns for ever, at a yearly rent, with a proviso for re-entry in case of non-payment of rent, it was held that the deed created only a tenancy from year to year. (*a*) If an intended lessee enters into possession of realty under an agreement for a lease, he is tenant at will or tenant by sufferance until the lease is made; but if he remains in possession and pays rent, he becomes tenant from year to year until the lease is duly executed according to the agreement. (*b*) In such a case the

(*u*) *Doe v. Browne*, 8 East, 165. See
Wood v. Beard, 2 Ex. D. 30.

(*x*) *Gwynne v. Mainstone*, 3 C. & P.
302.

(*y*) 13 Hen. VIII. 15 b; *Doe v.*
Watts, 7 T. R. 85.

(*z*) *Adams on Eject.*, 4th ed. 99;
Poth. Louage, partie 1, c. 2, art. 4,

23.
(*a*) *Doe v. Gardiner*, 12 C. B. 319.

(*b*) *Mann v. Lovejoy*, R. & M. 355;
Doe v. Pullen, 3 Sc. 276; *Doe v. Smith*,

tenant holds on such of the terms of the agreement as are applicable to a yearly tenancy; and if he enters under an agreement for a seven years' lease by which he is to do certain repairs in the last year of the term, and holds during the whole of the seven years, he must do the repairs. (c) And if he holds over after the expiration of the term, and the landlord receives from him rent which has accrued due subsequently to the expiration of the lease, he becomes a tenant from year to year. (d)

If a man takes possession of premises under an invalid lease from a tenant for life, and the remainderman accepts rent, or does any act recognizing the party in possession as his tenant, the latter forthwith becomes a lessee from year to year; (e) but the mere * acceptance of two shillings and [* 218] sixpence in a chief rent is not sufficient evidence of a tenancy from year to year. (f) So if a man enters into possession as an intended purchaser, and agrees "to pay and allow" to the vendor "at the rate of £100 per annum from the time of taking possession of the premises until the completion of the purchase in equal half-yearly payments," he becomes tenant to the intended vendor "at a fixed rent of £100 per annum, payable half-yearly." (g) A tenancy from year to year is ordinarily implied from the payment and acceptance of rent; but this *prima facie* presumption may be rebutted by showing that the money was paid or received by mistake. It is entirely repugnant to the notion of a tenancy from year to year that the option of determining it should rest solely with the tenant. The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit, has long been exploded. (h) A tenancy from year to year recommences every year. (i) A demise by a tenant from year to year to another also to hold from year to year, is in contemplation of law a demise from year to year during the

1 M. & R. 137; Knight v. Bennett, 11 Moore, 225; 3 Bing. 361; Doe v. Amey, 12 Ad. & E. 476; 4 P. & D. 177; Braythwaite v. Hitchcock, 10 M. & W. 497.

(c) Martin v. Smith, L. R. 9 Ex. 50.

(d) Bishop v. Howard, 3 D. & R. 297; 2 B. & C. 100.

(e) Doe v. Morse, 1 B. & Ad. 369.

(f) Smith v. Widdlake, 3 C. P. D. 10, C. A.

(g) Saunders v. Musgrave, 6 B. & C. 524; 9 D. R. 533.

(h) Doe v. Browne, 8 East, 167.

(i) Tomkins v. Lawrance, 8 C. & P. 731; Gandy v. Jubber, 33 L. J. Q. B. 151; Doe v. Dobell, 1 G. & Dav. 218. But this has been doubted, see Bartlett v. Baker, 34 L. J. Ex. 11.

continuance of the original demise to the intermediate landlord. (*k*)

Half-yearly, Quarterly, Monthly, and Weekly Hirings.¹⁶—If an annual rent is reserved, the holding is from year to year, although the contract of demise provides that the tenant shall quit at a quarter's notice. Such a contract differs only from the usual letting from year to year in the agreement by the parties to reduce the ordinary six months' notice to quit to three months. But if it is expressly agreed that the tenant is always to be subject to quit at six months' notice given him at any time, this constitutes a half-yearly tenancy, and the lessee will be presumed to hold from six months to six months from the time that he entered as tenant. If he is to hold until one of the parties shall give unto the other three months' notice to quit at the expiration of such notice, the tenancy will be a quarterly tenancy. (*l*) In the case of a demise of an unfurnished mansion at an annual rent, payable half-yearly or quarterly, the hiring is a hiring from year to year. In the case of cottages or unfurnished apartments in a house demised at a monthly or weekly rent, the presumption is in favor of a monthly or a weekly tenancy. Where a wharf, warehouse, and buildings were let on the terms that a
[* 219] quarter's rent * should be paid down on the day of the commencement of the tenancy, and should be continued to be paid in advance during the continuance of the hiring, it was held that this was a quarterly, and not a yearly hiring. (*m*) There is no objection in law to a tenancy determinable by a week's notice to quit, and a reasonable time being allowed after the expiration of the notice for the tenant to remove his goods. (*n*)

Tenancy at Will.¹⁷—If the lessor reserves to himself a right of re-entry at his own will and pleasure, or the lease contains an express stipulation to the effect that the tenancy may be put an end to at the will of either party, the holding is a tenancy at will. (*o*) The reservation of a yearly or quarterly rent is not

(*k*) Pike v. Eyre, 9 B. & C. 909.

(*n*) Cornish v. Stubbs, L. R. 5 C. P.

(*l*) Doe v. Grafton, 18 Q. B. 496; 21 L. J. Q. B. 276; Kemp v. Derrett, 3 Camp. 510.

334; 39 L. J. C. P. 202.

(*o*) Richardson v. Langridge, 4 Taunt. 131; Cudlip v. Rundal, 4 Mod. 12; 3

(*m*) Wilkinson v. Hall, 4 Sc. 301; Towne v. Campbell, 3 C. B. 921.

Salk. 156; Bayley v. Fitzmaurice, 8 Ell. & Bl. 679.

inconsistent with a tenancy at will. (*p*) A mere permission to occupy creates a tenancy at will. If a tenant for years holds over after the expiration of his lease, or continues in possession pending a treaty for a further lease, (*q*) or is admitted into possession pending a treaty for a purchase, (*r*) he is strictly a tenant at the will of the landlord, and may be turned out of possession without notice to quit; but if during the continuance of such tenancy at will the tenant has offered and the landlord has accepted rent for the use of the property, the law infers that a yearly tenancy was meant to be created between them. (*s*) A minister of a dissenting congregation placed in the possession of a chapel and dwelling-house by trustees in whom the property is vested in trust to permit the chapel and dwelling-house to be used for the purpose of religious worship, is a mere tenant at will to those trustees, and his tenancy is determined *instantly* by a demand of possession. (*t*) A tenant at will is entitled to retain possession of the land he holds until the lessor has made a demand of possession, (*u*) or has intimated, either by express words or by his conduct and actions, his determination to put an end to the tenancy. The holding may be determined by a letter stating that unless the tenant pays the lessor what he owes him, he will without delay take measures for recovering possession of the property, (*x*) or by a demand of possession on the part of the landlord, (*y*) or by his *entry [*220] on the land without the tenant's consent and making livery of seisin to another, (*z*) or exercising acts of ownership; also by his alienation of the reversion; by the tenant's quitting the premises; by the death of either of the parties; by the bankruptcy of the lessor; and, in short, by the doing of any act which amounts to a determination of the will on either side. But a tenant at will cannot determine his tenancy by transferring his

(*p*) Litt. sec. 72; Doe v. Davies, 7 718; 5 M. & R. 616, 752; Revett v. Exch. 91; 21 L. J. Ex. 60; Doe v. Cox, Brown, 2 Moo. & P. 12; 5 Bing. 7.
11 Q. B. 122; 17 L. J. Q. B. 3.

(*q*) Com. Dig. tit. Estates (H. 1); (u) Right v. Beard, 13 East, 210.
Doe v. Stennet, 2 Esp. 717. Bing. 356.

(*r*) Doe v. Chamberlaine, 5 M. & W. (y) Locke v. Matthews, 13 C. B. n. s.
14. 753.

(*s*) Clayton v. Blakey, 8 T. R. 3. (z) Ball v. Cullimore, 2 C. M. & R.

(*t*) Doe v. M'Kaeg, 10 B. & C. 721; 120.
5 M. & R. 620; Doe v. Jones, 10 B. & C.

interest to a third party, without notice to his landlord. (a) If the will is determined, and the landlord's consent to the occupation is withdrawn, so as to create an adverse possession, and the landlord afterwards does any act fairly leading to the presumption that he has renewed his consent to the holding, a fresh tenancy at will is created between the parties. (b)

Tenancy by Sufferance.¹⁸—When the landlord has demanded possession, or has done any act which is tantamount to a determination of the will, or when the tenant holds over at the expiration of a lease against the will of the lord, or after the expiration of a notice to quit, the tenant is said to be a tenant at sufferance in contradistinction to a tenant at will. (c) The expression, however, is not calculated to give a correct idea of the nature of the holding, and does not seem to have been very happily chosen. Although termed tenant by sufferance, he is understood to hold wrongfully and against the will, and contrary to the permission, of the landlord. He has, consequently, no estate or interest at all in the land; and an action of ejectment may at any time be brought against him without notice or demand of possession; and if the lord can get possession peaceably, he is entitled to take and retain possession, and so oust the wrongdoer. (d) The difference, therefore, between a tenancy at will and what is called a tenancy by sufferance is that in the one case the tenant holds by right, and has an estate or term in the land, precarious though it be, and the relationship of lessor and lessee subsists between the parties; in the other, the tenant holds wrongfully and against the will and permission of the lord, and has no estate at all in the occupied premises. When a tenancy at sufferance has existed for twenty years (now twelve), the landlord's right of entry is barred by statute, and the tenant becomes the absolute and complete owner of the property. (e)

Leases under Powers.—If a lease granted in the intended exercise of a power of leasing is invalid by reason of [* 221] the *non-observance of the terms of the power, such

(a) *Pinhorn v. Souster*, 8 Exch. 772.

(c) *Co. Litt.* 57 b.

(b) *Doe v. Turner*, 7 M. & W. 232; *Turner v. Doe*, 9 M. & W. 644; *Doe v.* 214.

(d) *Fox v. Oakley*, Peake's Ad. Ca.

Thomas, 6 Exch. 854; *Randall v. Stephens*, 23 L. T. R. 211.

(e) *Doe v. Gower*, 21 L. J. Q. B. 57; 37 & 38 Vict. c. 57, sect. 1.

lease, if made *bona fide*, and if the lessee has entered thereunder, is deemed a contract or agreement to grant the lease, and all persons who would have been bound by the lease, if lawfully granted under the power, will be bound by such contract. Acceptance of rent under such invalid lease is a confirmation of the lease as against the person so accepting rent. Leases, also, invalid at the time of the grant thereof, may become valid, if the grantor subsequently acquires the requisite power of leasing. (*f*)

Demise of Tolls.—The 8 & 9 Vict. c. 106, sect. 3, which provides that a lease required by law to be in writing of any tenements, &c., shall be void unless made by deed, does not apply to agreements for letting tolls under the 3 Geo. IV. c. 126. (*g*)

Rights and Liabilities of Lessor and Lessee.—Every lessor binds himself to give possession and not to give the party to whom he demises a mere right to take possession from a wrongdoer by an action of ejectment; (*h*) and every lessee binds himself to accept possession and pay rent. (*i*) If a party has agreed to take a house from a particular day, provided certain things are before then done by the landlord, and the things are not done, he may decline to go on with the contract, and may refuse to take possession. (*k*) A lessee who has contracted orally for the hire of realty, and who neglects or refuses to accept possession of the demised premises, cannot, as we have seen (*ante*, p.*159), be sued upon such oral agreement for damages for not taking possession, nor upon any oral promise to pay rent, nor for use and occupation. In the case of leases under seal, the law implies from the words “yielding and paying,” or any equivalent words amounting to a reservation of rent, a covenant on the part of the lessee to pay the rent so reserved, and, in the case of parol leases, a promise to the like effect. (*l*) But the liability

(*f*) 12 & 13 Vict. c. 26; 13 Vict. c. 17.

(*g*) *Shepherd v. Hodsman*, 18 Q. B. 216; 21 L. J. Q. B. 263.

(*h*) *Coe v. Clay*, 3 Moo. & P. 59; 5 Bing. 440; *Jinks v. Edwards*, 11 Exch. 775; *Neale v. Mackenzie*, 1 M. & W. 747; *Bract. lib. 2, c. 28, fol. 62.* As to

agreements for a lease, see *Drury v. Macnamara*, 5 Ell. & Bl. 616; 25 L. J. Q. B. 5.

(*i*) *Stanley v. Hayes*, 3 Q. B. 105.

(*k*) *Tidey v. Mollett*, *ante*, p. *179.

(*l*) *Bac. Abr. Leases*, 633; *Covenant*, B. 342.

of a lessee upon all express and implied covenants and agreements for the payment of rent is dependent upon his being put into possession, or being tendered and offered and afforded the power and opportunity of taking possession of the demised premises. (m) The quiet enjoyment also by the lessee, as against the lessor and all that come in under him by title, and against others claiming by title paramount, during the time in [* 222] respect of which the rent is claimed to have * accrued due, is a condition precedent to the tenant's liability for the payment of such rent. But the tenant is not released from liability by reason of a mere constructive eviction, (n) or a disturbance and interruption from a mere wrong-doer.

Covenants for Quiet Enjoyment.¹ — From the use by a grantor of certain words having a known legal operation in the creation of an estate, the law infers a covenant on the part of such grantor to protect and preserve the estate so created; as if a man by deed demises land for years, the word “demise” imports or makes a covenant in law for quiet enjoyment. (o) If by the term of a lease the lessor “warrants” the demised premises to the lessee, this amounts to an express covenant for quiet enjoyment during the whole term granted by the lease. (p) Covenants for quiet enjoyment are broken if the lessor builds on his own adjoining land so as to darken the lessee's windows, or does anything thereon which creates a nuisance. The erection of a gate across a lane through which the tenant has a way to the demised premises is a breach of a covenant for quiet enjoyment; (q) and so is the placing of any structure upon any part of the demised premises. (r) The covenant is prospective, and is only a covenant that from the time of granting the lease the premises shall not be obstructed by any act done thereafter, (s) or by the probable

¹ Covenant for quiet enjoyment, particularly between landlord and tenant, see Taylor, Land. & Ten. sects. 304–317; Wood, Land. & Ten. c. 34; McAdam, Land. & Ten. (2d ed.) 170, 417; Rawle on Covenants; U. S. Dig. tit. *Landlord and Tenant*, sect. 864; also ib. tit. *Covenants*, sect. 410; *Lanigan v. Kille*, 97 Pa. St. 120.

(m) *Holgate v. Kay*, 1 C. & K. 341.

(n) *Delaney v. Fox*, *ante*, p. * 213.

(o) *Hull v. City of London Brewery Co.*, 2 B. & S. 737; 31 L. J. Q. B. 257.

(p) *Williams v. Burrell*, *ante*, p. * 169.

(q) *Andrews v. Paradise*, 8 Mod. 319;

Morris v. Edgington, 3 Taunt. 24.

(r) *Kidder v. West*, 3 Lev. 167.

(s) *Anderson v. Oppenheimer*, 5 Q. B. D. 602, C. A.

or necessary consequence of any act done before the granting of the lease. (*t*) The usual express covenant by the lessor that the lessee shall quietly enjoy, &c., without interruption or disturbance by the lessor or any person claiming under him, is not broken by an entry on the tenant by the land-tax collector to distrain for arrears of land-tax due from the lessor, the disturbance not being by a person claiming by title from the lessor. (*u*) And where a covenant for quiet enjoyment is accompanied by a covenant by the lessee not to use the land for certain purposes, the first covenant does not guarantee to the tenant that he may lawfully use the land for any purpose not included in the restrictions in the lease. (*x*) So also an express covenant that an under-lessee should deliver up all landlord's fixtures at the end of the term, does not raise an implied covenant that he may remove trade fixtures. (*y*) Whenever a person *demises the surface of land, reserving a right to win [*223] and work minerals, he cannot exercise the right so as to let down or injure the surface; for that would be derogating from his own grant, and would also be a breach of a covenant for quiet enjoyment. (*z*)

Covenants for the Payment of Rent.¹—A covenant for the payment of rent at a specified time, when no place of payment is mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain; and it is accordingly incumbent on the covenantor to seek out the person to be paid, and pay or tender him the money. (*a*) If the tenancy is a yearly tenancy, and no time is specified for the payment of the rent, the rent will be due once a year. (*b*) If the rent is to be paid free of all outgoings,

¹ Tenant's covenant to pay rent, see Taylor, Land. & Ten. sects. 369–394; Wood, Land. & Ten. sect. 305; U. S. Dig. tit. *Landlord and Tenant*, IV. 1.

(*t*) *Shaw v. Stenton*, 2 H. & N. 858.

(*u*) *Stanley v. Hayes*, 3 Q. B. 105.

As to an implied covenant for title on the part of the lessor, or that he has power to grant an interest co-extensive with that which he assumes to grant, see *Line v. Stephenson*, 7 Sc. 69; *Bandy v. Cartwright*, 8 Exch. 913; *Stranks v. St. John*, L. R. 2 C. P. 376; 36 L. J. C. P. 118.

(*x*) *Dennett v. Atherton*, L. R. 7 Q. B. 316; 4 L. J. Q. B. 165.

(*y*) *Porter v. Drew*, 5 C. P. D. 143.

(*z*) *Proud v. Bates*, 34 L. J. Ch. 406.

As to what is included under the term "minerals," see *Bell v. Wilson*, L. R. 1 Ch. 303; 34 L. J. Ch. 572.

(*a*) *Haldane v. Johnson*, 8 Exch. 689.

(*b*) *Collett v. Curling*, 10 Q. B. 785.

it must be paid free of land-tax and tithe commutation rent-charge. (c) Where the lessor let his land at a rent payable quarterly, and afterwards mortgaged it, but remained in possession, and obtained from the lessee, who had no notice of the mortgage, a year's rent in advance, it was held that the payment of the rent before it became due was not a good payment as against the mortgagee, who, before the rent became due, gave the lessee notice to pay the rent to him. (d)

Covenants not to "Let, Set, or Demise,"¹ restrain an assignment; (e) and covenants not to "let or assign," (f) or not to "assign or otherwise part with" the demised premises, (g) restrain an underlease; but a covenant not to "grant any underlease, or let, assign, or otherwise part with the demised premises or any part thereof," is not broken by taking in a lodger who has the exclusive possession of the room he occupies. (h) Where a lessee took a person into partnership, and agreed that he should have the exclusive use of a back chamber and some other parts of the demised premises and the joint use of the rest, it was held that the covenant had been broken, and that the right to re-enter had accrued. (i) And in the case of a lease to two partners, an assignment by one partner of his undivided moiety of the lease to the other partner is a breach of a covenant not to assign. (k) A covenant by a lessee that he will not let or underlet for more than a year does not prevent him from granting leases [* 224] to commence at a * future day. (l) A devise of the term to a stranger is an assignment within the meaning of the proviso or covenant, but not a devise to the lessee's own

¹ Tenant's covenant not to assign or sublet, see Taylor, Land. & Ten. sects. 402-413; Wood, Land. & Ten. c. 33; McAdam, L. & T. (2d ed.) 172, 174; 16 Am. L. Rev. 16; U. S. Dig. tit. *Landlord and Tenant*, III.; also *Barhydt v. Burgess*, 46 Iowa, 476; *Fifty Associates v. Grace*, 125 Mass. 161; *Ebling v. Fuylein*, 2 Mo. App. 252; *Taylor v. De Bus*, 31 Ohio St. 468; and on the distinction between an assignment and subletting, *McNeil v. Kendall*, 128 Mass. 245.

(c) *Parish v. Sleeman*, 1 De G. F. & J. 326; 29 L. J. Ch. 96; *Sweet v. Seager*, 2 C. B. N. s. 119.

(d) *De Nicholls v. Saunders*, L. R. 5 C. P. 589; 39 L. J. C. P. 297; *Cook v. Guerra*, L. R. 7 C. P. 132; 41 L. J. C. P. 89.

(e) *Greenaway v. Adams*, 12 Ves. 395.

(f) *Roe v. Harrison*, 2 T. R. 425.

(g) *Doe v. Worsley*, 1 Campb. 20.

(h) *Doe v. Laming*, 4 Campb. 77.

(i) *Doe v. Sales*, 1 M. & S. 297.

(k) See *Corporation of Bristol v. Westcott*, 12 Ch. D. 461; *Varley v. Coppard*, L. R. 7 C. P. 505.

(l) *Croft v. Lumley*, 6 H. L. C. 737; 27 L. J. Q. B. 330.

executor, (*m*) nor an assignment by act and operation of law, (*n*) or by the act of God, or an assignment by the sheriff under an execution, unless the execution has been obtained by collusion with the creditor in fraud of the covenant. (*o*) If the lessee does assign or underlet, notwithstanding his covenant, the assignment or underlease is good, and the lessee is only liable to an action on his covenant, (*p*) unless there is a proviso in the original lease for re-entry in case of a breach of the covenant. (*q*) Where the lessee covenants not to assign without the consent of the lessor, "such consent not to be arbitrarily withheld," these words do not amount to a covenant by the lessor to give his consent; but an arbitrary refusal would leave the lessee at liberty to assign without consent. (*r*) And where the lessor's consent is not to be withheld from any assignment or underlease to a respectable and responsible person, an assignment or underlease to such person does not require lessor's consent. (*s*) Where a lessee under such a covenant contracted to assign subject to his landlord's approval, and he would not give leave, it was held that he was not bound to take legal proceedings to compel his landlord to consent, but might consider his contract with the third party at an end. (*t*) A covenant not to assign is not a usual covenant. (*u*)

Non-execution of the Lease by the Lessee.¹—A person who

¹ See Taylor, Land. & Ten. sects. 166-171; Wood, Land. & Ten. sects. 217-220; U. S. Dig. tit. *Landlord and Tenant*, sects. 692-726.

A lease written and recorded by the lessee, who took possession thereunder, — *Held*, to be sufficiently executed by him, though he did not subscribe it. *Traylor v. Cabanne*, 8 Mo. App. 131.

Execution by two of the three members of the committee of a benevolent society, with no words to indicate in whose behalf or in what capacity they signed, — *Held*, sufficient. *Carroll v. St. Johns, &c. Relief Society*, 125 Mass. 565.

Execution by lessee's agent, — *Held*, insufficient. *Kiersted v. Orange, &c. R. R. Co.*, 69 N. Y. 343.

A lease for ninety-nine years, renewable forever, if attested by but one witness, gives lessee only an equitable title. *Abbott v. Bosworth*, 36 Ohio St. 605.

Sealing by corporation, *Crawford v. Longstreet*, 43 N. J. L. 325.

(*m*) *Bac. Abr. Lease*, T.

(*n*) *Goring v. Warner*, 7 Vin. Abr. 85, pl. 9; *Doe v. Smith*, 5 Taunt. 795.

(*o*) *Doe v. Carter*, 8 T. R. 57, 300.

(*p*) *Paul v. Nurse*, 8 B. & C. 486.

(*q*) *Roe v. Harrison*, 2 T. R. 423.

(*r*) *Treloar v. Bigge*, L. R. 9 Ex. 151;

Lehmann v. McArthur, L. R. 3 Ch. 496;

Sear v. House Property Soc., 16 Ch. D. 387.

(*s*) *Hyde v. Warden*, 3 Ex. D. 72,

C. A.

(*t*) *Lehmann v. McArthur*, *supra*.

(*u*) *Hampshire v. Wickens*, 7 Ch. D.

555; *Wilson v. Redhead*, 28 W. R. 795;

has neither sealed and delivered an indenture of lease, nor entered and taken possession under it, cannot be made responsible upon the covenants contained in the indenture; but if he enters and takes possession by force of the lease, he is deemed in law to have covenanted to hold upon the terms of the indenture and to observe the conditions of the lease, and the lessor, therefore, may distrain or bring an action for the arrears of rent. (x) For every grantor of an estate may annex his own terms and conditions to the grant, which will constitute a covenant annexed to the estate, so that whosoever accepts the estate will be bound by the covenant, although he has not sealed and delivered any deed. If land is leased to two for a term of years, and [*225] one puts his seal and the *other agrees to this lease, and enters and takes the profits with him, he shall be charged to pay the rent, though he has not put his seal to the deed; but if there is a condition comprised in the deed which is not parcel of the lease, but a condition in gross, if he does not put his seal to the deed, though he is a party to the lease, he is not a party to the condition. (y) Where three were enfeoffed by deed, and there were several covenants in the deed on the part of the feoffees, and two of the feoffees only sealed the deed, and the third entered and agreed to the estate conveyed by the deed, he was held bound in a writ of covenant. (z) Where three windmills were demised by letters-patent under seal, which letters-patent contained a clause to the effect that the lessee and his assignees should repair and maintain the windmills during the term, and yield them up in good condition at the expiration thereof, and the lessee entered under the grant and took possession of the windmills, it was held that there resulted from the acceptance of the estate an express covenant to repair, which was annexed to the term granted, and ran with the land, and bound both the lessee and his assignees by reason of the privity of estate. (a) Where a lessee entered into possession of a house

Smith and Soden's Landlord and Tenant, 2d ed. 87.

(x) Brett v. Cumberland, 2 Roll. Rep. 63; Litt. sect. 374, 58; Mayor, &c. of Lyme v. Henley, 1 Bing. N. C. 237; Gregg v. Coates, 23 Beav. 39.

(y) 38 Ed. III., p. 8; Bro. Abr. (Dette) pl. 80; Fitz. Abr. (Dette) pl. 117; Co. Litt. 231 b.

(z) 2 Roll. Rep. 62.

(a) Brett v. Cumberland, 2 Roll. Rep. 63.

under an agreement to repair, and paid rent, and the lessor sold the estate and assigned all his interest to the plaintiff, and the lessee continued to occupy and paid rent to the plaintiff, it was held that the lessee must be presumed, in the absence of evidence to the contrary, to have agreed to continue to hold of the plaintiff on the same terms as he held of the original lessor, and that he was therefore responsible to the plaintiff for a breach of his agreement to repair. (b)

Non-execution of the Lease by the Lessor.¹—It is said that “if an indenture of lease be sealed only on the part of the lessee, and not on the part of the lessor, *nihil operat*, neither in respect of the interest nor in respect of the covenants; for the covenants depend upon the lease, and if there is no lease there is no covenant; for if the lease had been made and afterwards surrendered, all the covenants had been void.” (c) Where an indenture of demise for the term of eleven years, containing covenants to pay rent and repair, was executed by the lessee alone, and the latter entered and took possession and paid rent for several years, and the lessor assigned his reversion without ever having executed the lease, it was held that the assignee of the reversion could not sue upon any of the covenants of the lease, as the lease for eleven years to which they were annexed had never been created; that the only *reversion which could carry with [*226] it the right to sue upon the covenant was a reversion expectant upon the determination of the term for eleven years, which reversion had never been in existence, by reason of the non-execution of the lease by the lessor. (d) But as between the original parties, where a privity of contract exists between them,

¹ See Taylor, Land. & Ten. sects. 166–171; Wood, Land. & Ten. sects. 217–220; U. S. Dig. tit. *Landlord and Tenant*, sects. 692–726.

Signature by comptroller of municipal corporation, with his name and official title, — *Held*, insufficient. *Carleton v. Darcy*, 46 N. Y. Superior Ct. 484.

Execution by agent, within the scope of his authority, may be enforced by the principal. *So held*, even where the name of the lessors was followed by the words “agents as landlords.” *Nicoll v. Burke*, 78 N. Y. 580.

A lease executed by the members of a firm in their firm name is their contract, though the lessor is described as a company, and the members of this firm constituted the company. *Kantsky v. Atwood*, 79 Ill. 204.

(b) *Arden v. Sullivan*, 14 Q. B. 832. (d) *Cardwell v. Lucas*, 2 M. & W.

(c) *Soprani v. Skurro*, Yelv. 18. 123.

the lessee may, under certain circumstances, be held liable upon the covenants contained in the indenture, though the lease has not been executed by the lessor and the term created. It has been said that every lease must be construed in connection with surrounding circumstances, and that a lessee may, by entering upon and taking possession of tenements under an indenture sealed by him, and by dispensing with the execution of the indenture by the lessor, render himself liable to be sued upon his covenants as independent covenants, on the ground that a party may waive a condition in his favor and dispense with its performance; and that if a lessee executes his part of an indenture of lease, and enters and takes possession of the demised premises, and has the use of them, and gathers all the produce and profits of the soil for the whole term intended to be granted without ever having required the lessor to execute the indenture, he ought in justice to be deemed to have waived his right to treat the execution of the lease by the lessor as a condition precedent to his liability upon his covenants; and the Court of Queen's Bench has held that a lessee who has executed an indenture of demise containing a covenant to repair, and has entered and enjoyed for the whole term intended to be granted, is liable on his covenant, though the lease has never been executed by the lessor, and that the covenant becomes under such circumstances an independent covenant within the rule laid down in *Comyn's Digest*; (e) that if one party executes his part of an indenture, it shall be his deed, though the other does not execute his part. (f) But the Court of Exchequer has held that entry and taking of possession by lessee before execution of lease by lessor do not render the covenants to pay rent and repair independent. (g)

Concealment of Latent Defects.¹ — By the civil and continental law, "the lessor is bound to make known to the lessee all defects in the thing which he lets, and to explain everything that may give occasion to error or mistake." (h) But by our law, in contracts for the letting and hiring of realty, the lessor is not bound

¹ No implied warranty, *Edwards v. N. Y. & Harlem R. R. Co.*, 25 Hun, 634.

(e) *Fait (C)*, 2.

(g) *Pitman v. Woodbury*, 3 Exch. 12;

(f) *Cooch v. Goodman*, 2 Q. B. 599; *Swatman v. Ambler*, 8 ib. 80; and see *Littledale, J.*, 1 Ad. & E. 55; *Hughes v. How v. Greek*, 34 L. J. Ex. 4.

Clark, 10 C. B. 905.

(h) *Domat. liv. 1, tit. 3, sects. 3, 10.*

to disclose to the lessee latent defects interfering with the use and *enjoyment of the property let to hire. (i) [*227] A lessor of a house, for example, who knows that the house is in a ruinous and dangerous state and unfit for occupation, is not bound to disclose the fact to his lessee at the time that he grants the lease. (k)¹⁹

Having executed the lease, and put the lessee into possession of the demised premises, or placed them at his disposal, and clothed him with the legal title to the possession and occupation thereof for the term granted by the lease, the lessor has done all that is necessary for him to do to entitle himself to the rent at the time that it is made due and payable; he does not, in the case of demises of realty, warrant that the premises are, at the time of the demise, or that they shall continue to be during the term, in any particular state or condition, or fit for any particular purpose; and the lessee, therefore, is bound to pay his rent, although the subject-matter of the demise is not fit for the purpose for which he required it, and although he may have had no beneficial use or enjoyment of it. If indeed the lessor has been guilty of any fraudulent concealment of defects which ought in good faith to have been disclosed, or has resorted to any misrepresentation calculated to mislead the lessee in some important particular as to the condition of the demised premises, the contract will be void and the lessee will be discharged from the rent; but in the absence of all fraud and deceit, he is bound by his express covenant or contract, and must pay his rent, although he has not had that beneficial use and enjoyment of the demised premises which was anticipated. Thus there is no implied warranty on the part of a lessor who lets land for agricultural purposes that no noxious plants are growing on the demised premises. (l) And where the defendant took the eatage of a meadow from the plaintiff for the term of six months, at a rent of £40, and turned fifteen head of cattle into the meadow, eight of whom died from the poisonous effects of a quantity of refuse paint which had been placed on a manure heap, and had inad-

(i) *Hart v. Windsor*, 12 M. & W. 68; (l) *Erskine v. Adeane*, L. R. 8 Ch. 756; 42 L. J. Ch. 835.
Cornfoot v. Fowke, 6 M. & W. 358.

(k) *Keates v. Earl Cadogan*, 10 C. B. 591; 20 L. J. C. P. 76.

¹⁹ See Appendix, Vol. III.

vertently been spread over the grass prior to the defendant's occupation, and had afterwards been eaten by the cattle, and the defendant then took his stock off the land and tendered back the possession of the meadow to the plaintiff, which she refused to receive; it was held that the defendant was liable for the rent at the time it became due, although the eddish at the time of the demise was wholly unfit for the purpose for which it was taken, and the defendant had not had any beneficial use or enjoyment of it. (*m*)

[* 228] * **Demises of Uninhabitable Houses**¹ — **Rooms infested with Bugs.** — Where an action was brought for the non-payment of the rent of a house, and the defendant pleaded that the house was demised to him for the purpose of his inhabiting the same, and that at the time of the demise and of his taking possession, and from thence until he quitted, the house was unfit for habitation, and he could not dwell therein or have any beneficial use or occupation thereof, by reason of its being greatly infested with bugs, without any default on his part, and that before the rent became due, and as soon as he discovered the condition of the tenement, he quitted it, and gave notice to the plaintiff, and tendered him the possession thereof; it was held that the plea was no answer to the action, inasmuch as the law in the case of demises of unfurnished houses implies no warranty or engagement on the part of the lessor that the house is at the time of the demise, or at the commencement of the term, in a fit and proper state and condition for habitation. (*n*)

Payment of Rent. — Although, therefore, houses become ruinous and fall down, and buildings, fences, and superstructures erected upon the soil, and crops growing thereon, be destroyed by floods, or burned by lightning or accidental fire, or be thrown down by enemies, yet is the tenant liable to pay the rent so long as the land remains to him, and his legal title to the occupation

¹ Compare *Minor v. Sharon*, 112 Mass. 477; *Fash v. Kavanagh*, 24 How. Pr. 347; *Jaffe v. Hartean*, 56 N. Y. 126; *McAlpin v. Powell*, 70 N. Y. 126; 1 Abb. N. Cas. 427.

(*m*) *Sutton v. Temple*, 12 M. & W. 52; 27 Hen. VI. (Trin. Term), fol. 10, pl. 6; Hil. Term, 14 Hen. IV., fol. 27, pl. 35; Bro. Abr. (Dette) pl. 18, fol. 220.

(*n*) *Hart v. Windsor*, 12 M. & W. 68; *Manchester Warehouse Co. v. Carr*, 5 C. P. D. 507; as to bugs in furnished lodgings, see *Smith v. Marables*, p. * 294.

and use thereof continues. (*o*) If the landlord is bound by custom, or has entered into an express covenant to repair and uphold a house demised by him, and the lessee covenants to pay rent, the covenants are independent covenants, and the repairing and upholding of the house by the lessor is not a condition precedent to the liability of the lessee upon his covenant. (*p*)

Payment of Rent. — Exception of Damage by Fire. — If the lessee has covenanted to pay rent, "damage by fire excepted," and part of the demised premises is destroyed or injured by fire, the whole of the rent is not thereby suspended, but the tenant is entitled to a reasonable abatement. (*q*) And if the lessee covenants to pay rent, and also to repair, with an express exception of casualties by fire and tempest, the exception is confined to the covenant to repair, and does not qualify or affect the liability upon *the covenant to pay rent, unless it has [*229] been extended thereto by express words. (*r*)

Payment of Rent — Extinction and Suspension of the Rent by Eviction. — If the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended; but the act must be something of a grave and permanent character, dispossessing the tenant, and not a mere temporary trespass; (*s*) and there must be an actual dispossession of the tenant, and not a mere constructive eviction. (*t*) The tenant is not released from liability by reason of an eviction by a mere wrong-doer and trespasser who has no title at all to the possession of the demised premises. Thus where an action of debt was brought for three years' arrears of rent reserved upon a lease of a farm, and the defendant pleaded that Prince Rupert, an alien and enemy of the king, invaded

(*o*) *Carter v. Cummins*, cited 1 Ch. C. 84; *Pindar v. Ainsley*, cited 1 T. R. 312; *Bayne v. Walker*, 3 Dow. 233; *Leeds v. Cheetham*, 1 Sim. 146; *Arden v. Pullen*, 10 M. & W. 321; *Marquis of Bute v. Thompson*, 13 M. & W. 493, 494; *Lofft v. Dennis*, 1 Ell. & Ell. 481; 28 L. J. Q. B. 168; *Surplice v. Farnsworth*, 7 M. & Gr. 579; 8 Sc. N. R. 307.

(*p*) T. Term, 27 Hen. VI., fol. 10, pl. 6; Bro. Abr. (Dette) pl. 18; *Surplice v.*

Farnsworth, 8 Sc. N. R. 307; 7 M. & Gr. 584.

(*q*) *Bennett v. Ireland*, E. B. & E. 326.

(*r*) *Monk v. Cooper*, 2 Str. 763; *Bel-four v. Weston*, 1 T. R. 310.

(*s*) *Upton v. Townend*, 17 C. B. 64; *Carpenter v. Parker*, 3 C. B. N. s. 238.

(*t*) *Delaney v. Fox*, ante, p. *213; *Wheeler v. Steverson*, 30 L. J. Ex. 46; 6 H. & N. 158.

the realm, and with divers armed men did enter upon the demised premises, and expel him therefrom, and keep him out, so that he could not enjoy the lands during the term, "it was resolved that the matter of the plea was insufficient." And this distinction was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. Another reason was added, that as the lessee is to have the advantage of casual profits, he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor. (*u*) So where the parliament, during the civil wars, took possession of a house which had been demised to a lessee for a term of years, and turned it into an hospital for sick and maimed soldiers, and so prevented the lessee from having any beneficial occupation thereof for several years, notwithstanding which the lessor brought an action of debt for the rent, no question appears to have been made but that the lessee was bound at common law to make good the rent; and the lessee consequently brought his bill in equity for relief, on the ground that he had no remedy over against the wrong-doer, because it was an act of force in the parliament which had been pardoned by the act of oblivion; but it does not appear that he got relief even in equity. (*x*)

[*230] * **Payment of Rent. Eviction by Railway Companies under Statutory Powers.** — If the tenant is lawfully evicted by a railway company under the powers of its act, the tenant is discharged from the accruing rent, but not from rent that was due and in arrear at the time of the eviction. Where a yearly tenant received notice from a railway company to give

(*u*) *Paradine v. Jane*, Ayleyn, 27; Sty. 47; *Barrett v. Dutton*, 4 Campb. 333; *Maryon v. Carter*, 4 C. & P. 295; *Hills v. Sughrue*, 15 M. & W. 253; *Jervis v. Tomkinson*, 1 H. & N. 195; *Brown v. Royal Insurance Soc.*, 28 L. J. Q. B. 277.

(*x*) *Harrison v. Lord North*, 1 Ch.

Ca. 84; as to proof of expulsion, see *Mayor, &c. of Poole v. Whitt*, 15 M. & W. 577. As to evidence of eviction, see *Morrison v. Chadwick*, 7 C. B. 283; 18 L. J. C. P. 193; *Henderson v. Mears*, 28 L. J. Q. B. 305; *Wheeler v. Stevenson*, 6 H. & N. 158; 30 L. J. Ex. 46.

up possession of certain land within six months from the notice, and the notice expired in the middle of a half year, and the tenant gave up possession to the company without obtaining or requiring compensation in respect of his unexpired term and interest in the premises, it was held that he was liable to his landlord for the whole of the half-year's rent. (*y*) When a certain portion only of lands or tenements held by tenants or lessees has been taken by a railway company under the powers of its act, the rent is to be apportioned; and the rent to be paid by the tenant for the residue of the lands not taken by the company must be settled by agreement of the parties, or by two justices, or by a jury. (*z*)

Payment of Rent. Assignment of Reversion. — If the lessor, after granting the lease, sells and conveys all his estate and interest in the demised premises, he has no longer any right to the accruing rent. The rent passes with the reversion to the lessor's grantee without any attornment on the part of the tenant; but the tenant is not to be prejudiced or damaged by payment of rent to the lessor, or by breach of any condition for non-payment of rent before notice of the transfer and conveyance has been given to him by the grantee. (*a*) Prepayment is a good discharge for all rent which has become due before notice of the transfer (*b*), but not for rent which becomes due after notice. (*c*)

Payment of Ground-rent by the Tenant. Deduction thereof from the Tenant's Rent. — The immediate landlord is by the common law bound to protect his tenant from all paramount claims; and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is impliedly authorized to make the payment on the landlord's behalf; and the courts have held such payments to be

(*y*) *Wainwright v. Ramsden*, 5 M. & W. 602; *post*, *Notice to Quit*, p. * 269. (*b*) *Cook v. Guerra*, L. R. 7 C. P. 132; 41 L. J. C. P. 89.

(*z*) 8 & 9 Vict. c. 18, sect. 119; *Bac. Abr. Rent* (M); *In re Ware*, 9 Exch. 395. (*c*) *De Nicholls v. Saunders*, L. R. 5 C. P. 589; 39 L. J. C. P. 297; *ante*, p. * 223.

(*a*) 4 Anne, c. 16, sects. 9, 10. See *Allcock v. Moorhouse*, 9 Q. B. D. 336.

[*231] payments in satisfaction of *rent due, or accruing due, to the immediate landlord. Thus a tenant who has been compelled by a superior landlord, or other incumbrancer having a title paramount to that of his immediate landlord, to pay sums due for ground-rent or other like charges, may treat such payments as payments in satisfaction or part satisfaction of rent due to his immediate landlord. (*d*) But the tenant should deduct these payments from the next rent that becomes due, or from the rent of the current year; for if he allows several payments of rent to pass without giving his immediate landlord notice of the payment, and claiming the deduction, he will lose his right to deduct the money he has paid from the rent. (*e*) Payments of money on account of the landlord, not charged upon the demised premises and leviable upon the chattels of the occupier, cannot be given in evidence in satisfaction and discharge of the rent, unless they were expressly directed or sanctioned by the landlord. (*f*) The tithe commutation acts do not impose any personal liability on the landlord to pay the tithe rent-charge. (*g*)

Deduction of Income-tax, Land-tax, Sewers-rate, and other Outgoings from the Rent.¹—As regards land-tax, paving-rates, and property and income-tax charged on land demised to a tenant, (*h*) the tenant ought to deduct the tax or rate out of the next rent that becomes due. If he fails to do this, he cannot deduct it from subsequent rent, nor can he recover it by action from the landlord. (*i*) If the landlord is entitled to be relieved

¹ A tenant, being bound by a covenant in his lease to pay all assessments, paid one which was regular on the face of the proceedings, but which the landlord was contesting as invalid. The landlord ultimately prevailed, and the assessment was set aside. *Held* (following *Peyser v. Mayor, etc. of New York*, 70 N. Y. 497), that the tenant was entitled to recover back from the city the money he had paid. *Pursell v. New York*, 85 N. Y. 330.

(*d*) *Graham v. Allsopp*, 3 Exch. 198; (*g*) *Griffinhoofe v. Daubuz*, 4 E. & B. Taylor *v. Zamira*, 6 Taunt. 524; Jones 235.
v. Morris, 3 Exch. 742.

(*e*) *Andrew v. Hancock*, 3 Moore, 16 & 17 Vict. c. 35, sects. 60, 103; 278; *Spragg v. Hammond*, 4 Moore, 16 & 17 Vict. c. 34, sect. 40; 27 & 28 Vict. c. 18, sect. 15.

(*i*) *Andrew v. Hancock*, *supra*; (*f*) *Davies v. Stacey*, 12 Ad. & E. Denby *v. Moore*, 1 B. & Ald. 129; 511. *Cumming v. Bedborough*, 15 M. & W. 438.

from the assessment, it is his duty to take the necessary steps for the purpose; and if, before he has done this, the assessment is made on the occupier, and the tax paid, it may be deducted from the rent, although at the time the deduction is made the landlord has obtained his exemption from the tax. (*k*) The landlord is in general liable to pay taxes in proportion to the rent reserved, and not to the improved value. Where, therefore, a tenant built on land demised to him, and raised the annual value from £60 to £300, it was held that he was only entitled to deduct sewers-rate and land-tax upon the original rent, and that he was himself properly chargeable in respect of the improved value. (*l*) Where the lessor was also the owner of the tithe rent-charge upon the land, it was held that a covenant to pay "all taxes and assessments * whatsoever [* 232] for or in respect of the demised premises, save and except the level-tax, property-tax, and land-tax," did not include the tithe rent-charge, and that the lessee was not bound to pay it. (*m*) Where the lessee covenanted to pay the rent without any deduction, &c., and further, "to pay all manner of taxes, &c., charges and impositions whatever, &c., imposed by the authority of parliament or otherwise howsoever," and the lessor was compelled under an act to abate a nuisance from bad drainage, it was held that he was not entitled to call upon the lessee to pay. (*n*) An agreement by the landlord to repay the tenant all sums which he shall pay for the landlord's property-tax if the tenant will pay his rent in full without any deduction of landlord's property-tax, is good notwithstanding the provisions of the statute. (*o*)

The Roman law, in its exposition and enforcement of leases, was much more favorable to the tenant than our own law. There the enjoyment of the thing for the use of which the rent was agreed to be paid was a condition precedent to the lessor's right

(*k*) *Swatman v. Ambler*, 24 L. J. Ex. 185.

(*l*) *Smith v. Humble*, 15 C. B. 321.

(*m*) *Jeffrey v. Neale*, L. R. 6 C. P. 240; 40 L. J. C. P. 191.

(*n*) *Rawlings v. Briggs*, 3 C. P. D. 368, distinguishing *Thompson v. Lapworth*, L. R. 3 C. P. 149; see also *Hart-*

ley v. Hudson, 4 C. P. D. 367. But see *Budd v. Marshall*, 5 C. P. D. 481.

(*o*) 5 & 6 Vict. c. 35, sects. 60, 103; *Lamb v. Brewster*, 4 Q. B. D. 220, C. A. 607; as to agreements to pay rates, including a rate under 37 & 38 Vict. c. 54, sect. 3 (rating of mines), see *Chaloner v. Bolckow*, 3 Ap. Cas. 933.

to demand the rent. If, for example, the tenant was evicted by irresistible force, and kept out of possession, without any default on his own part, he was discharged from the rent, whether the eviction was the act of the lessor himself, or of persons having title, or the act of mere wrong-doers. If a house demised to a tenant for habitation became ruinous and uninhabitable; if the windows were blocked up or darkened, and the tenant deprived of light and air by the raising of the roof of an adjoining house, or his use and enjoyment of the property were interfered with by a nuisance which he had no means of abating, he might quit the demised premises, vacate his lease, and refuse further payment of rent. (*p*) If pasture land was demised for the purpose of feeding cattle, and poisonous herbs grew up and destroyed the beasts, the landlord lost his right to the rent. (*q*) If lands were granted to farm for the term of one year only, and the tenant by reason of some inevitable accident, such as a volcanic eruption, an earthquake, a frost, a hail-storm, an inundation, or a hostile incursion, lost the whole of the produce of the soil, and reaped

nothing, he was discharged from his rent. (*r*) If a partial injury only had * been sustained, — if, for instance, the growing crops were damaged by an extraordinary drought, or the unusual inclemency of the weather, — the lessee was entitled to a proportionable abatement of his rent. But in order to sustain his claim for an abatement, he was bound to show that the loss arose from some unusual occurrence not reasonably to have been expected and contemplated by the parties at the time of the making of the contract. He was never granted an abatement of rent in respect of losses in any way attributable to his own want of diligence or skill, nor in respect of any accident which might reasonably have been foreseen and guarded against, nor for inconsiderable and trifling losses. (*s*) And in all leases for terms of years, the good years were to be taken with the bad years, so that the lessee could not claim to be excused from rent

(*p*) Dig. lib. 19, tit. 2, lex 15, sect. 7, sect. 1; lex 33, lex 25, sect. 2; Cod. civ. 1726, 1727.

(*q*) "Si saltum pascuum locasti in quo herba mala nascebatur, et pecora vel demortua sunt, vel deteriora facta, quod interest præstabitur, si scisti si ignorasti,

pensionem non petes." — Dig. lib. 19, tit. 2, lex 19, sect. 1.

(*r*) Ib. lex 15, sects. 1, 2.

(*s*) Domat (Louage), No. 4, 5, 6; Pothier (Louage), No. 153; Dig. lib. 19, tit. 2, lex 15, sect. 2.

in respect of the total loss of the harvest in any one year of his tenancy, but could only claim the abatement towards the expiration of the term, upon a fair average of profit and loss. (*t*)

Right to distrain for Rent. — The law relating to distress will be found at the end of the present chapter, but the right to distrain for rent is here stated generally. The lessor's right to enter in person or by deputy upon the demised premises, and distrain the goods and chattels of the tenant for rent or services in arrear, has existed in this country from so early a period, "that we have no memorial of its original with us." (*u*) It was doubtless derived from the Roman law, which considered all the chattels and movables and personal property that the tenant brought upon the demised premises, and all the crops and fruits and produce of the soil growing or stored upon the land, to be hypothecated to the lessor as a security for the due payment of the rent, so that the lessor might, if rent was due and unpaid, enter upon the demised premises and take possession of such goods and chattels and produce, and hold the same as a security for the amount due. (*x*) This power of entering upon the land and taking corporal possession of the pledge is impliedly accorded to the lessor on every demise of realty where there is an express reservation of, or an agreement by the tenant to pay, a fixed, ascertained rent or service. (*y*) If there has been merely a permissive occupation of the property, without any previous payment of rent referable to some certain term of hiring or to some * definite portion of a year, the lessor has no [* 234] right of entry upon the land nor power to distrain, but must proceed by way of action upon the implied promise of the tenant to pay a fair and reasonable compensation for the permissive use and enjoyment of property. (*z*) By the 34 & 35 Vict. c. 79, the goods of lodgers (*a*) are protected against distresses for rent due to the superior landlord; and by the 35 & 36 Vict.

(*t*) Ib. s. 4; lex 55, s. 1; Instit. l. 3, tit. 25, s. 3; Cod. l. 4, tit. 66, lex 1.

(*u*) Gilbert on Distress; 2 Bro. Abr. (Distress), fol. 252; Bradby, 2.

(*x*) "In prædiis rusticis fructus qui ibi nascuntur tacite intelliguntur pignori esse domino fundi locati, etiamsi nominatim id non convenit." — Dig. lib.

20, tit. 2, 4, 7; Cod. lib. 8, tit. 15, lex 3; Bract. lib. 2, fol. 62, cap. 28.

(*y*) Litt. s. 214.

(*z*) Dunk v. Hunter, 5 B. & Ald. 325.

(*a*) An under-tenant may be a lodger. Phillips v. Henderson, 3 C. P. D. 26. What is a lodger, is a question of fact. Ness v. Stevenson, 9 Q. B. D. 245.

c. 50, railway rolling-stock is protected from distress when on the line.

Extinguishment of the Right to distrain by an Assignment of the Reversion.— If the lessor, after the making of the demise, conveys the property to a purchaser, he has no power to distrain for the rent that became due prior to the execution of the conveyance, as he is no longer possessed of the reversion expectant upon the determination of the lease. (*b*) Neither can the purchaser distrain for such rent; for it was a fruit fallen from the reversion at the time of the conveyance of the demised premises to him. (*c*) If, however, the conveyance was preceded by the ordinary agreement between vendor and purchaser vesting the equitable estate in the latter prior to the rent becoming due, the purchaser would be entitled to recover the rent by action. (*d*)

Apportionment of Rent and Conditions.— The 4 & 5 Wm. IV. c. 22, respecting the apportionment of rent, did not apply to leases created by parol. (*e*) But by the 33 & 34 Vict. c. 35, rents are to be deemed to accrue from day to day, and are apportionable in respect of time. By the Conveyancing and Law of Property Act, 1881, it is provided that, notwithstanding severance of the reversionary estate or the cesser of the term granted by a lease, as to part only of the land, every condition contained in the lease shall be apportioned. (*f*)

Of Compensation for the Use and Occupation of Land.— The landlord, where there is no agreement for any specific rent, is entitled to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the tenant, without proof of any demise, on the implied promise resulting from the simple fact of the permissive use and enjoyment of [* 235] the property; (*g*) * but no action will lie, unless there

(*b*) 43 Edw. III. 4; Bro. Abr. (Dette) 353; Plummer v. Whiteley, 29 L. J. Ch. pl. 39; Parmenter v. Webber, 8 Taunt. 247.

593; Preece v. Corrie, 5 Bing. 24. (*f*) 44 & 45 Vict. c. 41, sect. 12; the section only applies to leases made after Dec. 31, 1881.

(*c*) Midgley v. Lovelace, Carth. 289; 12 Mod. 46. (*g*) 11 Geo. II. c. 19, sect. 14; Churchward v. Ford, 26 L. J. Ex. 354; 2 H. & N. 446; Hellier v. Sillico, 19 L. J. Q. B. 295; Levy v. Lewis, 6 C. B. n. s. 766; 9 C. B. n. s. 874; 28 L. J.

(*d*) Anon., Skinn. 367; Midgley v. Lovelace, Carth. 290. As to the mode in which a distress must be levied, and other incidents, see *post*, Sect. II.

(*e*) Cattley v. Arnold, 28 L. J. Ch.

is a promise either express or implied to pay for the use and occupation. (*h*)

Constructive Occupation. — An actual personal occupation is not necessary to entitle the landlord to compensation, when the lessee has entered and taken possession, and the term has become vested in him. (*i*) But there must be proof of an actual entry on the land (*k*) and taking of possession, or it must be shown that “there has been an occupation by some other parties standing in such a relation to the defendant that their occupation is his, and that he is personally liable for it.” (*l*) An entry by one of two joint lessees is an entry by both, so as to render both liable. (*m*) The action is maintainable where no certain rent has been reserved, and where there is, consequently, no right to distrain. (*n*) The compensation accrues *de die in diem*, so that if there is no express contract for the payment of rent at specific periods, the lessor is entitled to be paid from day to day so long as the occupation lasts. (*o*) Very slight circumstances, such as entry on the lands, the putting up a notice or advertisement, sending a woman to clean windows or rooms, or workmen to put up paper or do repairs, will suffice to establish the fact of entry and of actual occupation. (*p*)

An occupation by an under-tenant of the lessee is the lessee's own occupation, as much as if he were himself personally present upon the land. But if one of two joint lessees holds over after the expiration of his lease without the assent of his co-lessee, the latter is not responsible in respect of the occupation of such co-lessee. (*q*) The occupation of the wife before marriage is not the occupation of the husband. (*r*) The actual possession and

C. P. 304; 30 L. J. C. P. 141; *Hardon v. Heskeith*, 4 H. & N. 178.

(*h*) *Turner v. Cameron's Coal, &c.*, 5 Exch. 937; *Carmier v. Mercer*, cited *Birch v. Wright*, 1 T. R. 387; *Mayor of Newport v. Saunders*, 3 B. & Ad. 412.

(*i*) *Baker v. Holtzaffel*, 4 Taunt. 45; *Izon v. Gorton*, 7 Sc. 547; 5 Bing. N. C. 507; *Pollock v. Stacy*, 9 Q. B. 1033.

(*k*) *Lowe v. Ross*, 5 Exch. 553; 19 L. J. Ex. 318; *How v. Kennett*, 3 Ad. & E. 665.

(*l*) *Bull v. Sibbs*, 8 T. R. 327.

(*m*) *Glen v. Dungey*, 4 Exch. 61; 18 L. J. Ex. 359.

(*n*) *Waring v. King*, 8 M. & W. 574; *Hamerton v. Stead*, 5 D. & R. 211; 3 B. & C. 482.

(*o*) *Packer v. Gibbins*, 1 Q. B. 421.

(*p*) *Sullivan v. Jones*, 3 C. & P. 579; *Smith v. Twoart*, 2 M. & Gr. 841.

(*q*) *ibbs v. Richardson*, 9 Ad. & E. 849; 1 P. & D. 618; *Christy v. Tancred*, 9 M. & W. 438, 448; *Draper v. Crofts*, 15 M. & W. 166; 15 L. J. Ex. 92.

(*r*) *Richardson v. Hall*, 3 Moore, 307.

use by one of two executors of property holden on lease by their testator is not in law a possession and use by both, and does not render both chargeable as joint occupiers in their own right. (*s*) If a lessor sells or transfers his legal estate and interest in the demised premises to a third party, and the lessee receives notice of the transfer, and is required to pay his rent to the transferee

and refuses, he is liable to an action at the suit of the [* 236] latter. (*t*) The * defendant may show that the plaintiff's interest in the premises has expired, or has been transferred to some third party; but he is estopped from denying the lessor's title to grant the property to be enjoyed, and cannot show that the lessor has only the equitable estate, or that he is entitled only as co-executor with others who do not join in the action. (*u*) A tenant who has occupied land under a corporation and paid rent to the corporate body, is liable for use and occupation, although the corporation cannot in general contract except by virtue of its common seal; (*x*) and a corporation which has actually occupied and used lands, &c., may be made liable during the period of occupation, but not afterwards, unless there is a demise under seal. (*y*)

If a man is let into possession under an agreement for a lease to be granted at a future time, and occupies, and receives the profits of, the land, he is liable for a reasonable compensation to be paid to the owner for the use and enjoyment of the property. (*z*) But if he takes possession of property as a purchaser, under a contract of purchase and sale, and the vendor is unable to make out a title, and the bargain, consequently, goes off, the purchaser is not in general bound to pay any compensation or remuneration to the owner for the temporary occupation and enjoyment of the property. (*a*) If, however, after a contract of purchase and sale has gone off or been abandoned, the intended

(*s*) *Nation v. Tozer*, 1 C. M. & R. 175.

(*t*) *Lumley v. Hodgson*, 16 East, 104; *Birch v. Wright*, 1 T. R. 378; *Rennie v. Robinson*, 7 Moore, 223.

(*u*) *Phipps v. Sculthorpe*, 1 B. & Ald. 50.

(*x*) *Mayor of Stafford v. Till*, 12 Moore, 260.

(*y*) *Finlay v. Bristol & Exeter Ry. Company*, 7 Exch. 417; 21 L. J. Ex. 116; see *ante*, p. * 89.

(*z*) *Mayor of Thetford v. Tyler*, 8 Q. B. 100.

(*a*) *Kirtland v. Pounsett*, 2 Taunt. 145; *Winterbottom v. Ingham*, 7 Q. B. 611; 14 L. J. Q. B. 298.

purchaser continues to occupy and take the rents and profits of the land, by the sufferance and permission of a party who is then entitled to the immediate possession, he is bound to pay a reasonable compensation to such party for the permissive use and occupation of the property. (*b*) So if the vendor of a house continues to reside in it after he has sold it, he is not liable in respect of such subsequent residence, unless it be shown that he was permitted to remain in possession upon the express or implied understanding that the occupation was to be paid for. (*c*) If a lessor has agreed to complete a house demised by him, and the tenant enters and occupies, and the landlord neglects to fulfil his agreement, he is nevertheless entitled to recover a reasonable sum in respect of the use and occupation by the tenant of the incomplete house. (*d*) If the tenant or occupier has entered as a trespasser and wrong-doer, and has remained in possession and used and occupied the land to

* the exclusion of the owner, it appears to be some- [* 237]
what doubtful whether the latter may waive the tort

and consent to the occupation, and sue the tenant upon the ordinary implied promise to pay a reasonable remuneration for the occupation and enjoyment of the property. But if the owner accepts rent from a trespasser, this is a waiver of the tort and a creation of a tenancy, with its accompanying rights, duties, and responsibilities. If the landlord assigns his interest, and the tenant has notice of the assignment, and continues to occupy with the consent of the assignee, he may be sued by the latter, (*e*) but not otherwise. (*f*) A lessee is not liable for use and occupation after he has been adjudicated a bankrupt, whether the trustees accept his interest in the premises, or disclaim it. (*g*)

Use and Occupation by one of several Joint-Tenants or Tenants-in-Common. — By the 4 Anne, c. 16, sect. 27, it is enacted that actions of account may be maintained by one joint-tenant

(*b*) *Howard v. Shaw*, 8 M. & W. 122.

(*c*) *Tew v. Jones*, 13 M. & W. 12; see *Met. Ry. Co. v. Defries*, 2 Q. B. D. 189, 387, C. A.

(*d*) *Smith v. Eldridge*, 23 L. T. R. 270.

(*e*) *Standen v. Christmas*, 16 L. J. Q. B. 265; 4 Anne, c. 16, sect. 9.

(*f*) *Cooke v. Moylan*, 1 Exch. 67; *Allcock v. Moorhouse*, 9 Q. B. D. 366.

(*g*) Bankruptcy Act, 1869, sect. 23.

and tenant-in-common, his executors, &c., against the other as bailiff, for receiving more than comes to his just share or proportion, and against the executor, &c., of such joint-tenant or tenant-in-common. This statute applies to cases where two or more persons are tenants-in-common of land leased to a third party at a rent payable to each, or where there is a rent-charge, or any money payment, or payment in kind, due to them from another person, and one receives the whole, or more than his proportionate share according to his interest in the subject of the tenancy, and not to cases where one has enjoyed more of the benefit of the land, and made more by personal occupation of it than another. There are many cases in which a tenant-in-common may occupy and enjoy the common land solely, and have all the advantage to be derived from it, and yet not be liable to pay anything to his co-tenant-in-common. (*h*)

Covenants and Agreements to repair Dilapidations.¹—There is no implied covenant or promise, either on the part of the lessor or the lessee of a house, to repair or uphold it during the term. In *Dyer*, it is said to be “reasonable law,” where a lease of a house has been made without any covenant on either side to repair, “that the termor should require the lessor to do the repairs; and if the lessor, after notice and request, be negligent, whereby the house falls, the lessee shall have an action upon the case against the lessor for not repairing it, and shall recover as much in damages as the inconvenience he suffers from the want of his house shall amount to.” (*i*) But [*238] the Court of (Queen’s Bench has *held that there is no obligation on the part of a landlord to repair in the absence of an express contract in that behalf; and, therefore, if a house demised falls, and destroys the furniture of the

¹ Repairing the demised premises, see *Taylor, Land. and Ten.* sects. 327–368; *Wood, Land. and Ten.* c. 35; *McAdam, Land. and Ten.* c. 25.

For the decisions, see *U. S. Dig. tit. Landlord and Tenant*, sects. 385–443, 876; also, *Greene v. Hague*, 10 Ill. App. 598; *Block v. Ebner*, 54 Ind. 544; *Stultz v. Locke*, 47 Md. 562; *Moyer v. Mitchell*, 53 Md. 171; *Goebel v. Hough*, 26 Minn. 252; *Hervey v. Gay*, 42 N. J. L. 168; *Hexter v. Knox*, 63 N. Y. 561; *Butler v. Kidder*, 87 N. Y. 98; *White v. Albany Ry.*, 17 Hun, 98; *Sheary v. Adams*, 18 Hun, 181; *Mitchell v. Nelson*, 13 S. C. 105.

(*h*) *Henderson v. Eason*, 21 L. J. Q. B. 82. (*i*) *Dyer*, 36 b.

lessee, the landlord will not be responsible in damages. (*k*) Where the lessor covenants to keep in repair, there is no breach until after notice of want of repair. (*l*) But want of notice is no answer to an action for breach of a covenant to put into repair. (*m*) Where the landlord covenants to keep in repair, he must execute repairs, having regard to the class of buildings to which the lease refers, and not merely to condition of the particular building. (*n*) Every covenant by a lessee that he will well and sufficiently repair and maintain the demised premises during the term, and deliver them up at the expiration thereof in good repair and condition, will be construed in connection with surrounding circumstances; and the extent of the liability will depend upon the age of the buildings, the state and condition of them at the time of the demise, and the length of the lease. If the house is an old house, the tenant is bound to keep it up only as an old house, and cannot be compelled to replace old materials with new. (*o*) "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about, in diminishing the value, constitute a loss which, so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by, seasonable applications of labor to keep the house as nearly as possible in the same condition as when it was demised. If it appears that he has made these applications, and laid out money from time to time upon the premises, it would not be fair to judge him very rigorously by the reports of a surveyor, who is generally sent in for the very purpose of finding fault. The

(*k*) *Gott v. Gandy*, 2 E. & B. 845;
23 L. J. Q. B. 1.

(*l*) *Makin v. Watkinson*, L. R. 6 Ex.
25; 40 L. J. Ex. 33; *London & S. W.
Ry. v. Flowers*, 1 C. P. D. 77; *Man-
chester Warehouse Co. v. Carr*, 5 C. P.
D. 507.

(*m*) *Coward v. Gregory*, L. R. 2 C.
P. 153; 36 L. J. C. P. 1.

(*n*) *Saner v. Bilton*; 7 Ch. D. 815.
Such a covenant implies a license from
the tenant to enter to do the repairs.
Saner v. Bilton, *supra*.

(*o*) *Harris v. Jones*, 1 Mood. & Rob.
175.

jury are to say whether or not the lessee has done what was reasonably to be expected of him, looking to the age of the premises on the one hand, and to the words of the covenant which he has chosen to enter into on the other.” (*p*) If [** 239*] the lessee ** has covenanted to keep the demised premises in good repair during the term, and at the time of the demise they were old and in bad repair, he must put them in good repair as old premises, and not keep them in bad repair because they happened to be in that state when he took them. The age and class of the premises, however, with their general condition as to repair, must be looked at in order to measure the extent of the repairs to be done. (q) If the lessee has covenanted to repair buildings, “the same being first put into repair by the lessor,” the liability of the lessee does not arise until after all the buildings have been put into repair by the lessor, (r) who is bound to repair in the first instance. (s) When the lessee has entered into an express covenant or agreement to repair, uphold, and keep in repair a house, or any other structure or building demised to him, he is bound to rebuild or reconstruct it if it is burned by an accidental fire, or blown down by tempest, or destroyed by floods or by an inevitable accident; for “when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.” And therefore, if the lessee covenants to repair a house or a bridge, and the house is burned down by lightning or an accidental fire, or thrown down by enemies, or the bridge is washed away, the lessee must rebuild. (t) The ordinary covenant to repair the demised tenements and dwelling-houses does not extend (so as to create a forfeiture under a proviso for re-entry in case of non-performance of covenant) to an entirely new structure erected during the term, not in existence and not forming part of any buildings on*

(*p*) *Tindal, C. J., Gutteridge v. Mumyard*, 1 *Moqd. & Rob.* 336.

(*q*) *Payne v. Haine*, 16 *M. & W.* 545; 16 *L. J. Ex.* 130.

(*r*) *Neale v. Ratcliff*, 15 *Q. B.* 916; 20 *L. J. Q. B.* 130; *Coward v. Gregory*, 36 *L. J. C. P.* 1; *L. R.* 2 *C. P.* 153.

(*s*) *Cannock v. Jones*, 3 *Exch.* 233.

(*t*) 40 *Edw. III.* fol. 6, pl. 11; *Paradine v. Jane*, *Aleyn.* 27; 2 *Saund.* 421 a (2); *Dyer*, 33 a, pl. 10; *Brecknock Company v. Pritchard*, 6 *T. R.* 750; *Bullock v. Dommitt*, *ib.* 650; *Chesterfield v. Bolton*, 2 *Com. Rep.* 627.

the premises at the time of the execution of the lease, (*u*) unless it appears that the land was demised for building purposes, and that the erection of buildings by the lessee during the term was contemplated by the parties, and that the covenant was meant to extend to buildings thereafter to be erected. (*a'*)

Where a lease, executed on the 9th of November, contained a covenant on the part of the lessee to repair, and the tenant had taken possession and pulled down buildings in the preceding month of June, it was held that he could not be made responsible in an action of covenant, as the lease was not then executed, * although the *habendum* of the lease stated [*240] that the premises were to be holden from the preceding 22d of June. The *habendum* marked only the duration of the tenant's interest, and could not operate retrospectively as a grant. (*y*) If the lease is under seal, and the tenant has bound himself by covenant to repair, and the landlord assigns his interest, the assignee is entitled, as we shall see (*post*, p. * 1273), to sue upon the covenant. (*z*) A covenant to put into repair is not a continuing covenant; (*a*) but covenants to keep in repair are covenants which run with the land, and are continuing covenants to the end of the term. (*b*) And the recovery of damages for a breach of them is no bar to an action for a subsequent breach, but only matter in mitigation of damages. (*c*) They extend to all additions and enlargements of structures existing at the time of the demise, but not to detached, independent buildings erected after the making of the lease. (*d*) If the landlord has evicted the tenant from part of the demised premises, the tenancy is not, as we have seen, thereby determined, and the tenant is not discharged from the performance of a covenant to repair. (*e*) The landlord is entitled to recover damages for breach of a contract

(*u*) *Cornish v. Cleife*, 3 H. & C. 446; 34 L. J. Ex. 19.

(*z*) *Dowse v. Cale*, 2 Vent. 136; 3 Lev. 264.

(*y*) *Shaw v. Kay*, 1 Exch. 412; 17 L. J. Ex. 17.

(*z*) *Bickford v. Parsons*, 17 L. J. C. P. 192.

(*a*) *Coward v. Gregory*, L. R. 2 C. P. 153; 36 L. J. C. P. 1.

(*b*) *Martin v. Clue*, 22 L. J. Q. B. 147.

(*c*) *Coward v. Gregory*, L. R. 2 C. P. 153; 36 L. J. C. P. 1.

(*d*) *Cornish v. Cleife*, 34 L. J. Ex. 19; 3 H. & C. 446.

(*e*) *Morrison v. Chadwick*, *ante*, p. * 229, * 230.

to yield up in repair at the end of the term, although he immediately proceeds to demolish the buildings. (*f*)

Where a party entered into possession under a lease which was void as to the duration of the term from its being an invalid execution of a power, but the lessee had the benefit of the possession of the land and the perception of the profits for the whole term purported to be granted, he was held liable upon his covenant to repair contained in the same lease. (*g*) And where articles of agreement under seal were entered into between an intended lessor and lessee for the grant of a lease for twenty-one years, as soon as a license from the lord of the manor (the land being copyhold land) could be obtained, and the lessee covenanted to keep the premises in repair during the term so to be granted, and subsequently entered and took possession of the land, and occupied the same under the agreement for the full term of twenty-one years, it was held that he was responsible upon his covenant to repair, although the intended lease had never been made, nor any license obtained from the lord. (*h*) If the lessee

has not entered and held under the indenture of demise [*241] executed by him, and *upon the terms of the covenant he has thought fit to enter into, but under a distinct parol demise, then he is not liable upon the covenants of the lease. (*i*) Where a lease made under a leasing power was void from non-compliance with the requirements of the power, but the lessee entered and took possession, and paid rent, and then assigned his interest, and the assignee entered and paid rent under the void lease, and continued in possession until the end of the term intended to have been granted, it was held that he must be taken to have promised to hold upon the terms of the lease, and that he was liable for not repairing according to the covenant therein contained. (*k*) We have already seen (*kk*) that if a party assents verbally to certain printed terms of hiring, and enters and takes possession, he will be bound by the printed terms, although they are not signed either by him or by the

(*f*) *Rawlings v. Morgan*, 18 C. B. N. s. 776; 34 L. J. C. P. 185.

(*g*) *Beale v. Sanders*, 3 Bing. N. C. 850; 5 Sc. 58.

(*h*) *Pistor v. Cater*, 9 M. & W. 815.

(*i*) *Pitman v. Woodbury*, 3 Ex. 12.

(*k*) *Beale v. Sanders*, 5 Sc. 58; 3 Bing. N. C. 859; *Lee v. Smith*, 23 L. J. Ex. 199.

(*kk*) *Ante*, p. *212.

lessor. (*l*) Where a tenant gave a written undertaking to hire a house for three years, and to pay rent and repair during the term, but there was no lease or agreement on the part of the lessor, and the tenant entered and took possession and held the premises for more than three years, it was held that he was responsible for neglecting to repair according to his undertaking. (*m*)

The owner of two houses, 38 and 40, demised 38 by lease containing a covenant by the lessee to repair walls and party walls. Afterwards he demised 40 similarly. No. 40 was built so as to extend over a gateway between it and No. 38, and it rested on the wall which was a party-wall between 38 and the gateway, but this wall did not belong to No. 40. In an action by the lessee of 40 against the owner, it was held that there was no implied covenant on his part to repair this party-wall. (*n*) It was said that if an action were brought by the owner against the lessee of No. 40, it might be an answer to say that the owner had neglected some precedent obligation because No. 40 could not be repaired without first repairing this party-wall; but the suggestion is not very clear. (*o*)

By the statute of Anne, as we have seen (*ante*, p. * 230), the assignee of the reversion cannot sue for the rent without having given notice of the assignment; but there is no provision to that effect with respect to his right to sue or eject for a forfeiture for non-repair, for the tenant may not know to whom to pay the rent without notice, but he must know that he ought to repair. (*p*)

*** Of the Tenant's Liability for Injury or Damage done [* 242] to the Demised Premises.** — In the absence of an express covenant or agreement to repair, there results from the demise and acceptance of the lease by the lessee an implied covenant or promise, according as the lease is by deed or by simple contract, to use the property demised in a tenant-like and proper manner, to take reasonable care of it, and restore it, at the expiration of the term for which it is hired, in the same state and condition as it was in when demised, subject only to the deterioration produced

(*l*) Lord Bolton *v.* Tomlin, 5 Ad. & E. 856.

(*m*) Richardson *v.* Gifford, 1 Ad. & E. 55.

(*n*) Colbeck *v.* Girdlers Co., 1 Q. B. D. 234.

(*o*) Colbeck *v.* Girdlers Co., *supra*.

(*p*) Sealstock *v.* Harston, 1 C.P.D. 106.

by ordinary wear and tear, and the reasonable use of it for the purpose for which it was known to be required. The extent of the liability of the tenant for the preservation of the property depends upon the duration and value of his own term and interest therein. A tenant for life, for example, is bound to watch over the interests of the reversioner, and is responsible for permissive as well as commissive waste, whilst a tenant-at-will, or from year to year, is responsible only for commissive waste. (*g*)

Permissive Waste by Lessees for Terms of Years.—A tenant for term of years is responsible for permissive as well as commissive waste, (*r*) but where he has not obliged himself by covenant to do repairs, he is not bound to rebuild; for if the subject of occupation perishes from time and natural decay, the landlord is the person to provide a new one, if he think fit. (*s*) A tenant for years must not suffer the roof of a house to remain uncovered, so as to let the timbers rot, and must use all reasonable endeavors to keep the buildings wind and water tight; but he is not bound to repair the principal timbers of the roof, nor to replace old materials with new, except where the expense is of a trifling character, and the mischief, if neglected and left unrepaired, would operate to the lasting injury of the inheritance. If a roof is blown off by tempest, he is not bound to put on a new roof; but if a few tiles only are stripped off, he is bound to replace them, or adopt means to keep out the wet. (*t*) The extent of the liability of a lessee, not holding under a covenant or agreement to repair, for permitting buildings demised to him to go to decay and ruin, will depend upon the age and general state and condition of the buildings at the time he took possession of them, the nature and extent of the repairs required for their preservation, and the duration of his own term and interest in [* 243] the property; (*u*) for a tenant-at-will or tenant * from year to year cannot be expected to do as much for the

(*g*) *Harnett v. Maitland*, 16 M. & W. 256; *Herne v. Bembow*, 4 Taunt. 764; *Jones v. Hill*, 7 Taunt. 392; 1 Moore, 100; *Torriano v. Young*, 6 C. & P. 12.

(*r*) *Yellowly v. Gower*, 11 Exch. 294; 24 Law J. Exch. 299.

(*s*) *Bayley, J., Wise v. Metcalfe*, 10 B. & C. 314.

(*t*) See *Lady Shrewsbury's case*, 5 Co. 13 b; *M'Kenzie v. McLeod*, 4 M. & Sc. 253; 10 Bing. 385; *Salop v. Crompton*, Cro. Eliz. 777.

(*u*) *Ferguson v. ———*, 2 Esp. 590; *Anworth v. Johnson*, 5 C. & P. 239.

preservation of the property as a tenant for a long term of years. If a house is burnt by negligence, this, as we shall presently see, is waste; and if sea-walls and river-banks are destroyed from want of timely reparation, this will be waste; but if they receive the usual and customary repairs, and are destroyed by a great tempest or a violent inundation, the lessee is not responsible for waste if he fails to rebuild them. (*x*) So where a building is destroyed by what is under all the circumstances an apparently reasonable user of the building, tenant is not liable for "waste." (*y*)

Commissive Waste by Tenants for Terms of Years. — Whenever a tenant or lessee makes material changes in the nature of the premises demised to him, which have the effect of converting them into something substantially different from what they were at the time they were placed in his hands, he is guilty of commissive waste, and is responsible in damages for infringing upon the proprietary rights of the landlord. The tenant by the lease has the use, not the dominion, of the property demised to him, and cannot make permanent changes and alterations in the property without the consent of the landlord, although such changes and alterations may greatly enhance the value of it; for the owner has a right to have his houses and lands kept in an unaltered state, surrounded by all their old features, landmarks, and associations. (*z*) Therefore an action is maintainable by the reversioner pending the term against the tenant for inclosing and cultivating waste land included in the demise, and for continuing the grievance; (*a*) also for the pulling down of an old building and the substitution in lieu thereof of tenements of greater value, (*b*) for stopping up the windows, (*c*) or for removing a partition wall in a house and enlarging a chamber. (*d*)

Where a lessee opened a new door in a house, whereby the house was not in any respect weakened or injured, it was held to be a question for the jury whether there was or was not any injury to the rights of the reversioner. (*e*) But if there is any

(*x*) 2 Roll. Abr. *Waste* (C).

(*b*) *Cole v. Green*, 1 Lev. 309.

(*y*) *Manchester Warehouse Co. v. Carr*, 5 C. P. D. 507, following *Saner v. Bilton*, 7 Ch. D. 815.

(*c*) *Thomlinson v. Brown, Sayer*, 215.

(*d*) 2 Roll. Abr. 815, pl. 9.

(*e*) *Young v. Spencer*, 10 B. & C.

(*z*) *Smyth v. Carter*, 18 Beav. 78. 145.

(*a*) *Provost, &c. of Queen's College v. Hallett*, 14 East, 489.

substantial alteration in the form and arrangement of the house, the house is no longer the same house, and there is an invasion of the proprietary rights of the landlord or reversioner. It is no answer to an action for the infringement of these rights to say that the defendant might, before the expiration of the [* 244] lease, restore the * premises to their former plight, and surrender them up to the landlord in their original condition. (*f*)

The lessee of a water-mill, worked by a head of water penned back under a prescriptive right to pen back water for the purpose of working the mill, has no right to alter the height of the tumbling-bay, or transpose or alter the old permanent water-marks, as it tends to destroy the landlord's evidence of title to the head of water, and goes to the destruction of the thing granted. The lessee of house property must not remove wainscots or floors, or pull down and rebuild, or open new windows and doors, and change the form and arrangement of the house, without the consent of the owner. He cannot convert one species of edifice into another, such as a corn-mill into a fulling-mill or malt-mill, or a water-mill into a wind-mill, though the conversion be to the pecuniary advantage of the landlord, as well as to the benefit of the tenant. (*g*) He must not fell timber-trees (except for the necessary repairs of a house he has covenanted to repair), nor destroy spring-woods or young plants destined to become trees; but he may cut willows, maples, beeches, and thorns, if they do not shelter a dwelling-house, or sustain a bank, or afford shelter to cattle, and the cutting of them is not prejudicial to the inheritance. He may also cut oaks and ashes where they are usually cut as underwood, and are in due course to grow up again from the stumps, and the cutting is warranted by local custom and usage. He must not dig for gravel, lime, clay, brick-earth, stone, or the like, except for the necessary repair and improvement of the demised premises, in fulfilment of the covenants of his lease. He must not remove virgin soil, (*h*) nor open quarries or mines of metal

(*f*) Provost, &c. of Queen's College v. Hallett, 14 East, 489; Cole v. Forth, *infra*. (g) Bac. Abr. (*Waste*); Cole v. Forth, 1 Mod. 94; Co. Litt. 53 a, 53 b.

(*h*) Higgon v. Mortimer, 6 C. & P. 616.

or coal, for the purpose of selling the produce thereof; but he may work mines and quarries which were open and in existence at the time of the demise, as they then form part of the annual profits of the land. He must not convert arable land into pasture, or pasture into arable land, or plough up a warren, or stub up a wood to make it pasture, or divert the courses of streams, nor dry up ancient pools or fish-ponds, nor destroy fences, nor put land under water, nor destroy the stock or breed of anything. He must not take all the fish out of a fish-pond, or the doves from a dovecote, or the deer from a park, or the rabbits and conies from a warren, or the game from preserves; but he is entitled to the reasonable use and enjoyment of them, leaving as many in store for the landlord when he goes out as he

* found when he was intrusted with the possession and [* 245] use of the property. (*i*)

Waste may be committed by removing glass annexed to windows, for it is parcel of the house; and although the lessee himself, at his own cost, put the glass in the windows, yet, being once parcel of the house, he cannot take it away or waste it. Wainscot also, whether annexed to the house by the lessor or the lessee, is parcel of the house, and cannot be removed, unless it is purely of an ornamental character (*post*, p. * 244); and there is no difference in law if it be fastened by great nails or little nails, or by screws or irons put through the posts or walls, (*k*) for every chattel affixed to the soil of another becomes a part of the soil, and belongs to the owner of the land, unless it is shown to have been affixed there in the necessary enjoyment of an easement by the person entitled to the easement, in which case it will belong to the latter, and not to the owner of the soil. (*l*)

Waste by Tenant from Year to Year. — Tenant from year to year is not responsible for permissive waste. Where an action on the case was brought by a lessor against a lessee holding from year to year for suffering a house demised to him to go to ruin for want of repairs to the roof and windows, it was held that such an action was not maintainable. "There is no doubt,"

(*i*) *D'Arcy (Ld.) v. Askwith*, Hob. 234; *Phillips v. Smith*, 14 M. & W. 593; *Bac. Abr. (Waste)*; *Litt. sect. 71*.

(*k*) *Herlakenden's case*, 4 Co. 63, b; *Wilde v. Waters*, 16 C. B. 637.

(*l*) *Lancaster v. Eve*, 5 C. B. N. s. 717.

observes Mansfield, C. J., "but that an action on the case may be maintained for wilful waste; but at common law, if any part of the premises is suffered to be dilapidated, it amounts to permissive waste; and if this action be maintainable against tenant from year to year, such an action might be brought against a tenant-at-will who omitted to repair a broken window. I think this action is an innovation, and I am not disposed to encourage it." (*m*) But every tenant from year to year is bound to take all due and reasonable care of the premises demised to him, and if windows are broken by the wind or hail, and the rain gets in, he is liable for the non-repair of them, if the consequences of his neglect would be damage to the building from the rain.

A mere tenant-at-will, whose interest the Roman lawyers called "*precarium*," or a mere tenant from year to year, is not bound, unless by special contract, to expend money in repairs and improvements. "The farmer," observes Domat, "ought to use the lands he has in farm as any prudent and discreet man would use his own, and to keep them, preserve them, and cultivate them at the proper seasons, in the manner agreed on by the lease, or regulated by custom. He cannot increase his profits out of the lands to the prejudice of the proprietor. He cannot sow arable lands when they ought to lie fallow, nor sow wheat when he ought only to sow barley or oats, if these changes would make the lands to be in a worse condition at the end of the lease than they ought to be." (*n*)

The lessee of land who erects a building thereon does not commit waste by so doing, unless it can be shown that such building is an injury to the inheritance. (*o*)

Timber Trees.—Wherever trees are excepted from a demise, there is, by implication, a right in the landlord to enter on the land and cut the trees at all reasonable times. (*p*)

Of the Duty of the Tenant to Preserve the Landlord's Landmarks and Boundaries.—Where a tenant for life, or for years, or at will, has land of his own adjoining to that which he holds as tenant, it is his duty to keep the boundaries between the two

(*m*) Gibson v. Wells, 1 B. & P. N. R. 290; Herne v. Benbow, 4 Taunt. 764; 539.

Martin v. Gilham, 7 Ad. & E. 543.

(*p*) Hewitt v. Isham, 7 Exch. 79.

(*n*) Domat, l. 1, tit. 4, sect. 2.

properties clear and distinct, so that at the expiration of the tenancy, the reversioner or remainder-man may be able without difficulty to resume the possession of what belongs to him; and if the tenant or lessee neglects this duty, and suffers the boundaries to be confused, so that the reversioner or remainder-man cannot tell to what land he is entitled, the courts will give relief by compelling the person who has occasioned the difficulty to remove it, and restore the proper boundaries, if it can be done, or if not, to give an equivalent. This relief is given not only against the party guilty of the neglect, but also against all those who claim under him, either as volunteers or purchasers without notice. (*q*)

Fences. — There is no implied agreement on the part of a lessor to keep up the fences of closes which he retains in his own hands, and which abut on land demised to a tenant, so as to prevent the tenant's cattle from straying on to them. (*r*)

Restrictive Covenants as to the User of Premises entered into between lessor and lessee run with the land (*post*, p. *1275). A general covenant by the lessee that he will not do, or suffer to be done, upon the demised premises anything which may become an annoyance to the tenants of the adjoining houses may prevent him from opening a shop or coal-office, or carrying on any trade or business in a dwelling-house. (*s*)

A lessee covenanted not to do anything to annoy or diminish * the value of the property adjoining, or build [* 247] without the approval of the lessor, &c. The owner afterwards leased the adjoining property to another, who made a similar covenant. The first lessee began to build with the approval of the lessor. It was held that the second lessee could not call upon the owner to restrain the first from building. (*t*) Where a building has been erected without complaint, the court will not grant a mandatory injunction to pull it down. (*u*) Where a lessor covenanted that he would not let any other house in the

(*q*) *Attorney-General v. Stephens*, 6 De G. M. & G. 111; 25 L. J. Ch. 888.

(*r*) *Erskine v. Adeane*, L. R. 8 Ch. 756; 42 L. J. Ch. 835.

(*s*) *Wilkinson v. Rogers*, 10 Jur. N. S. 5.

(*t*) *Master v. Hansard*, 4 Ch. D. 718; *Renals v. Cowlishaw*, 11 Ch. D. 866. See, however, *Nicoll v. Fenning*, 19 Ch. D. 258.

(*u*) *Gaskin v. Balls*, 13 Ch. D. 324, C. A.

same street "for the purpose of an eating-house," and then let a house to a person who set up an eating-house, although covenanting not to do so, it was held that the lessor was not liable to the first lessee. (*x*)

Where the lessee covenanted not to carry on any "business, &c., whatsoever, or anything of the nature thereof, or to suffer anything which may grow to the annoyance, &c., of the neighborhood," he was prohibited from using the premises as a throat hospital, where small payments were made by the patients. (*y*)

The Right to remove Fixtures¹ without incurring liability for waste is considered at length in many learned treatises; (*z*) but the present chapter will be confined to the consideration of fixtures that have been held removable or irremovable as between landlord and tenant.

Landlord's Fixtures. — The term "landlord's fixtures" means such things as the landlord chooses to annex to the freehold and demise with it, and which of course the tenant has no right to remove, and must restore at the end of the term: such as grates, marble chimney-pieces, locks, keys, bars and bolts, steam-engines and boilers, hay-cutters, malt-mills, corn-crushers, grinding-stones, &c. (*a*)

Tenant's Fixtures. — The rule formerly was that where a lessee, having annexed a personal chattel to the freehold during his term, afterward took it away, it was waste. In the progress of time this rule was relaxed, and many exceptions have been grafted upon it. One has been in favor of ornament, as orna-

¹ On the nature of fixtures generally, and the right of removal as between landlord and tenant, see Tyler, *Fixtures*; Ewell, *Fixtures*; Taylor, Land. and Ten. 397-408; Wood, Land. and Ten. c. 47; McAdam, L. & T. c. 14; Abb. L. Dict. *Fixtures*.

For the decisions, see U. S. Dig. tit. *Fixtures*; ib. tit. *Landlord and Tenant*, sect. 444; also, Robinson v. Wright, 2 McArthur, 54; Griffin v. Ransdell, 71 Ind. 440; Globe Marble Mills Co. v. Quinn, 76 N. Y. 23; Watriss v. First Nat. Bank, 124 Mass. 571; Stokoe v. Upton, 40 Mich. 581; Josslyn v. McCabe, 46 Wis. 591; Dobschuetz v. Holliday, 82 Ill. 371; McAuliffe v. Mann, 37 Mich. 539; Hayes v. New York Gold Min. Co., 2 Col. T. 273; Torrey v. Burnett, 38 N. J. L. 457; Seeger v. Pettit, 77 Pa. St. 437; Linahan v. Barr, 41 Conn. 471; Holbrook v. Chamberlin, 116 Mass. 155; note by M. D. Ewell, 21 Am. L. Reg. N. s. 55.

(*x*) Kemp v. Birl, 5 Ch. D. 974, C. A.

(*y*) Bramwell v. Lacy, 10 Ch. D. 691; Garman v. Chapman, 7 Ch. D. 271. For effect of covenant to pay extra rent if a noxious trade should be carried on, see Weston v. Met. Ass. Dist., 9 Q.B.D. 404.

(*z*) Amos, *Fixtures*; Grady, *Fixtures*.

See D'Eyncourt v. Gregory, L. R. 3 Eq. Ca. 382.

(*a*) Walmsley v. Milne, 7 C. B. N. s. 115; 29 Law J. C. P. 97.

mental chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like. (*aa*) Of all these it is to be observed that they are exceptions only. (*b*) Other exceptions have been grafted upon the rule in favor of the enjoyment of the occupation, and in favor of trade, * and vessels, [*248] machinery, and utensils which are immediately subservient to the purposes of trade. (*bb*) If a landlord lets a house unfurnished, without the conveniences of grates or gas-fittings, and the tenant, for the enjoyment of his occupation, fixes them in the house, he may, unless he has contracted to leave them behind, remove them during his term. Whether a particular fixed chattel belongs to the landlord or the tenant, must in some instances depend upon what the contracting parties propose to be the subject of the demise. (*c*) Pillars of brick and mortar built on the floor of a dairy by a tenant to sustain milk-pans have, however, been held to be part of the freehold; (*d*) also barns and beast-houses, wagon-houses, fuel-houses, pigeon-houses, carpenters' shops for mending wagons and carts, and agricultural buildings employed and used upon the farm, and let into the ground, and not merely placed on the surface thereof, or on a brick or stone floor; (*e*) also railway sleepers; (*ee*) also conservatories, hot houses, or green-houses, erected on a brick or stone foundation, and attached thereto by permanent fastenings; so that if the tenant removes them after he has put them up he is guilty of waste. (*f*) But if the tenant raises and constructs foundations of a permanent character for the reception of a superstructure of wood, and the superstructure merely rests on this foundation, or is attached thereto by screws or movable pins or bolts so as to be removable at pleasure without material or permanent injury to the freehold, the movable structure placed on

(*aa*) See the cases collected in Smith and Soden's L. & T. 2d ed., p. 244.

(*b*) *Buckland v. Butterfield*, 4 Moore, 447.

(*bb*) See the cases collected in Smith and Soden's L. & T. 2d ed., p. 240.

(*c*) *Elliott v. Bishop*, 10 Exch. 496; 11 ib. 113; *Sumner v. Bromilow*, 34 L. J. Q. B. 130.

(*d*) *Leach v. Thomas*, 7 C. & P. 327.

(*e*) *Elwes v. Maw*, 3 East, 38; 2 Smith's L. C. 153, 6th edit.; *Wood v. Hewett*, 8 Q. B. 913.

(*ee*) *Turner v. Cameron*, L. R. 5 Q. B. 306.

(*f*) *Buckland v. Butterfield*, 4 Moore, 440; 2 B. & B. 54; *Jenkins v. Gething*, 2 Johns. & H. 520; *Syme v. Harvey*, 24 Sc. Sess. Cas. 502; *Sleddon v. Cruikshank*, 16 M. & W. 71; 16 L. J. Exch. 61.

such foundation by the tenant continues the property of the latter, and may be carried away by him at the expiration of his lease. (*g*) A door which may be lifted from its hinges, and a sliding fender used to prevent the escape of water from a mill-stream, does not necessarily become part of the freehold; (*h*) nor a mooring-pile driven into land for the accommodation of the navigation of a canal or river; (*i*) nor looms of a worsted mill fixed by nails. (*ii*) But locks, keys, and bars belong to the landlord; and so does a shutter and sliding bolt put up for the security of the premises.

Agricultural Tenant's Fixtures made removable by
 [* 249] **Statute.** — * By 14 & 15 Vict. c. 25, sect. 3, it is enacted that if any tenant shall with the consent in writing of the landlord, at his own cost and expense, erect any building, engine, or machinery for the purposes of trade or agriculture, such buildings shall be the property of the tenant, and shall be removable by him, one month's previous notice in writing being given of his intention, and the landlord or his agent being afforded an opportunity of purchasing the thing proposed to be removed, as therein mentioned.

If a tenant receives from his landlord timber for the purpose of erecting a shed, and uses the timber in the construction of it, he has no right to pull down the building and remove the timber, although he has added materials of his own, and confounded them in the erection with those furnished by the landlord. (*k*)

By the Agricultural Holdings Act, 1875, it is enacted that where after the commencement of this act a tenant affixes to his holding any engine, machinery, or other fixture for which he is not under this act or otherwise entitled to compensation, and which is not so affixed in pursuance of some obligation in that behalf, or instead of some fixture belonging to the landlord, then such fixture shall be the property of, and be removable by, the tenant.

(*g*) *Grymes v. Boweren*, 4 M. & P. 143; 6 Bing. 437; *Rex v. Otley*, 1 B. & Ad. 161; *Wansbrough v. Maton*, 4 Ad. & E. 884; *Davis v. Jones*, 2 B. & Ald. 165; *Rex v. Londonthorpe*, 6 T. R. 377; *Wiltshier v. Cottrell*, 22 L. J. Q. B. 181.

(*h*) *Wood v. Hewitt*, 15 L. J. Q. B. 247.

(*i*) *Lancaster v. Eve*, 5 C. B. N. S. 726.

(*ii*) *Holland v. Hodgson*, L. R. 7 C. P. 328; *Ex parte Astbury*, L. R. 4 Ch. 630; *Longbottom v. Berry*, L. R. 5 Q. B. 123.

(*k*) *Smith v. Render*, 27 L. J. Ex. 83.

Provided as follows:—

1. Before the removal of any fixture the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding.
2. In the removal of any fixture the tenant shall not do any avoidable damage to any building or other part of the holding.
3. Immediately after the removal of any fixture the tenant shall make good all damage occasioned to any building or other part of the holding by the removal.
4. The tenant shall not remove any fixture without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it.
5. At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture comprised in the notice of removal, and any fixture thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as * to the value shall be [*250] settled by a reference under this act, as in case of compensation (but without appeal):

But nothing in this section shall apply to a steam-engine erected by the tenant if, before erecting it, the tenant has not given to the landlord notice in writing of his intention to do so, or if the landlord, by notice in writing given to the tenant, has objected to the erection thereof.

Ornamental Fixtures.—The ornamental fixtures now held severable and removable by the tenant are chimney-glasses, pier-glasses, ornamental chimney-pieces and stoves, tapestry and hangings nailed to the wall in lieu of ornamental paper or panels, (*l*) and ornamental cornices capable of being detached without injury to the building. (*m*)

Domestic and Trade Fixtures.—Amongst the various domestic

(*l*) *Beck v. Rebow*, 1 P. Wms. 94.

(*m*) *Avery v. Cheslyn*, 3 Ad. & E. 75.

and trade-fixtures held to be removable by the tenant are gas-pipes and gas-fittings, and water-pipes attached to buildings by metal bands and nails, grates, ranges, ovens, coppers, bells, blinds, fixed tables, water-butts, cupboards, &c., (n) soap-boilers' furnaces, fat-vats, coppers, dyeing and brewing vessels, cider-mills, baking-ovens, steam-engines, and salt-pans; (o) also machinery, engines, vats, plant and utensils used in trade, however bulky or complex they may be in their construction. The tenant may take them to pieces and remove them, and put them together again in the same form in some other place. And where a shed or building is a mere accessory to a trade fixture, such as a shed or any temporary building erected merely for the purpose of covering and protecting a steam-engine, or machinery or trade utensils, from the effect of the weather, it may be removable, together with the trade-fixture to which it belonged, on the ground that *omne accessorium sequitur suum principale*. But a building is not removable merely because it has been erected for manufacturing or trading purposes, or for the purpose of covering and protecting machinery. If the building is of a substantial character, standing on brick or stone foundations let into the soil, and is constructed so as not to be removable without the entire destruction of the fabric, it cannot be disannexed from the freehold and taken away, although it may be built over a steam-engine, and may contain nothing but steam-machinery, spinning-jennies, drums and wheels, all of which may be removable, and to all of which it may in a certain sense be accessory. (p)

[* 251] * **Fixtures removable by Local Custom and Usage.**—

Things annexed to the freehold are sometimes held removable in accordance with local custom and usage in particular districts, such as barns and granaries erected on stone pillars, or on pattens or blocks of timber. (q) And if the pillars or pattens merely rest on the ground, and are not attached to founda-

(n) Wall v. Hinds, 4 Gray's Amer. Rep. 272; Elliott v. Bishop, ante, p. *248.

(o) 42 Edw. III., fol. 6, pl. 19; 20 Hen. VII., fol. 13, pl. 24; Poole's case, 1 Salk. 368; Lawton v. Lawton, 3 Atk. 13; Penton v. Robart, 2 East, 90.

(p) Whitehead v. Bennett, 27 Law J. Ch. 474.

(q) 11 Vin. Abr. 154; Executors, U. pl. 74; Culling v. Tuffnell, Bull. N. P. 34.

tions sinking into the soil, they are removable without any custom. (r)

Abandonment of the Right to disannex and remove Ornamental and Trade Fixtures.—If the tenant has entered into an express covenant to yield up, at the expiration of his term, “all erections and buildings that may be erected,” or “all improvements that may be made,” upon the demised premises, he cannot afterward remove trade erections or buildings, or trade or ornamental or domestic fixtures. (s) A covenant in a lease to yield up the demised premises to the lessor at the expiration of the lease, together with all fixtures thereunto belonging, is confined to fixtures which belonged to the demised premises at the time of the execution of the lease, and does not extend to fixtures which were not then in existence; but a covenant to yield up fixtures belonging, or that may belong, to the demised premises, extends to fixtures that are afterward put up by the tenant. (t)

Inability of the Tenant to remove Fixtures after the Expiration of his Term.—Whenever an outgoing tenant is possessed of fixtures which he has a right to remove, he must exercise such right prior to the determination of his tenancy; he cannot, after a formal disclaimer of the title of his landlord, or after he has once quitted the demised premises and given up the key to the landlord, re-enter for the purpose of severing and removing fixtures. “After the term, they become a gift in law to him in reversion, and are not removable,” unless the tenant, after the expiration of the term, has remained in possession, with the sufferance and permission of the landlord, and actually severs them and removes them during the continuance of his lawful possession, after the expiration of the term. If he holds over wrongfully, he loses his right to sever and remove his fixtures; and if he quits possession, and the tenancy is determined, his right to his fixtures is extinguished, and they become the property of the reversioner. (u) If the lease be-

(r) 2 Smith's L. C. 6th ed.; notes to *Elwes v. Maw*.

(s) *Naylor v. Collinge*, 1 Taunt. 19; *Thresher v. E. L. Water Co.*, 2 B. & C. 608; 4 D. & R. 62; *Martyr v. Bradley*, 2 M. & Sc. 25; 9 Bing. 24; *West v. Blake-way*, 3 Sc. N. R. 218; *Elliott v. Bishop*,

ante, p. *248; see also *Dumergue v. Rumsey*, 33 L. J. Ex. 88; *Sumner v. Bromilow*, 34 ib. Q. B. 180.

(t) *Hitchman v. Walton*, 4 M. & W. 414; *Metrop. Co. Ins. Soc. v. Brown*, 28 Law J. Ch. 581.

(u) *Leader v. Homewood*, 5 C. B.

[*252] comes *forfeited, and the tenant, whilst he continues in possession after the forfeiture, and before judgment in ejectment has been obtained against him, removes his fixtures, he will be entitled to retain those removed within a reasonable time, as they are not forfeited to the landlord by the forfeiture of the lease. (x) But if the landlord re-enters for the forfeiture, the tenant's right to remove the fixtures is gone. (y)

Right of Purchasers or Mortgagees to enter and remove Fixtures.

—The right of the assignee of the lessee can, of course, in general, extend no farther than the right of the lessee himself; but the tenant's right to remove fixtures is held to be so far connected with the land, that it may be considered as a right or interest in it, which, if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender, "for as regards strangers who were not parties or privies to the surrender, the estate surrendered hath in law a continuance;" (z) and, therefore, if a lessee who has mortgaged his fixtures surrenders his term and quits possession, the mortgagee may nevertheless enter and remove the fixtures. (a) Trade fixtures affixed to mortgaged premises by the mortgagor in a quasi-permanent manner, before or even after the mortgage, pass to the mortgagee. (b) An equitable mortgagee has the same rights in this respect as a legal mortgagee. (c)

Waste committed by Strangers upon Land demised to a Tenant or Lessee. — Every lessee of land, whether for life or years, is liable, under the statute of Gloucester, to an action for commissive or wilful waste done on the land in lease, by whomsoever it may be committed. The statute of Gloucester "prohibiteth farmers from doing waste; and yet, if they suffer a stranger to do waste, they shall be charged with it, for it is

n. s. 546; 27 *Law J. (C. P.)* 316; *Ruffey v. Henderson*, 21 *ib. Q. B.* 49; 17 *Q. B.* 574; *Heap v. Barton*, 12 *C. B.* 274. *Co.*, 6 *C. B. n. s.* 798; 28 *Law J. C. P.* 297.

(x) *Stansfield v. Mayor of Portsmouth*, 4 *C. B. n. s.* 131; *Sumner v. Bromilow*, 34 *L. J. (Q. B.)* 130; but see *Storer v. Hunter*, 3 *B. & C.* 368. (b) *Cullwick v. Swindell*, *L. R.* 3 *Eq. Ca.* 249; *Climie v. Wood*, *L. R.* 3 *Exch.* 257; 4 *Exch.* 328 (*Exch. Ch.*); 38 *L. J. Exch.* 223; see *Boyd v. Shorrock*, *L. R.* 5 *Eq. Ca.* 72; *Ex parte Ashbury*, *L. R.* 4 *Ch. App.* 630; *Longbottom v. Berry*, *L. R.* 5 *Q. B.* 123; *Holland v. Hodgson*, *L. R.* 7 (C. P.) 328.

(y) *Pugh v. Acton*, 38 *L. J. Ch.* 619; *L. R.* 8 *Eq. Ca.* 626.

(z) *Co. Litt.* 338 b.

(a) *Lond. & Westminster Loan, &c.*

(c) *Tebb v. Hodge*, *L. R.* 5 *C. P.* 73.

presumed in law that the farmer may withstand it; ‘*Et qui non obstat quod obstare potest, facere videtur.*’ In this case the lessor shall have his action of waste against the lessee, and the lessee his action of trespass against him that did the waste, and so the loss, as reason requireth, in the end shall lie upon the wrong-doer.” (*d*)

License to commit Waste. — If a general or partial permission be given to the lessee by the lease to commit waste, he is so far tenant * without impeachment of waste. [*253] Such permission vests the property of what is the subject of waste in the lessee, so that he avails himself of it during the continuance of his interest. It is so with respect to trees and minerals. Where land was demised for a term of years, with liberty to the lessee to dig half an acre of brick-earth to a certain depth annually, and the lessee covenanted that if he dug more he would pay an increased rent of £375 per annum per acre, and a stranger dug and took away brick-earth, it was held that the lessee was entitled to recover from the stranger the full value of such brick-earth. (*e*)

Right of Reversioners to enter upon Lands in the Possession of their Lessees to inspect Waste. — The law gives to the lessor, or him who hath the reversion, liberty to enter upon the lands of his lessee to see if there be waste, to the intent that he may have his action, if there be cause for it; and if the lessee prevents the inspection, he is liable to an action for damages. (*f*).

Injuries to Lands and Tenements from Fire. — The involuntary and unintentional burning of a house, through the negligence of the tenant or his servants, amounts, in contemplation of law, to no more than permissive waste; and for this a tenant-at-will or from year to year is not, as we have seen, responsible to the reversioner (*ante*, p. *245). Where the Countess of Shrewsbury brought an action against a lawyer of the Temple, and declared that she leased to him a house at will, “*et quod ille tam negligenter et improvide custodivit ignem suum quod domus illa combusta fuit,*” it was held that the action was not maintainable, as it was in effect an action for permissive waste, for which a

(*d*) 2 Inst. 146.(*f*) Hunt v. Dowman, Cro. Jac.(*e*) Attersoll v. Stevens, 1 Taunt. 183. 478.

tenant-at-will was not answerable. (*g*) Every landlord who demises buildings to a tenant must be taken to contemplate all the ordinary risks to which house property is exposed from fire and the negligence of servants intrusted with fire and candles; (*h*) and if he wishes to be protected from these risks he must either insure, or take from his lessee a covenant to repair and maintain the premises. If he fails to do so, and the premises are destroyed by fire, without any gross or culpable negligence on the part of the tenant, the landlord will have no remedy for the loss. If the fire has been caused by such an amount of gross negligence as to give it the appearance of a wilful act, the party guilty of the misconduct, whether it be the tenant or a stranger to the demise, will be answerable for commissive waste.

Every tenant of a house is responsible for not taking [* 254] care that * the stop-cocks for regulating the supply of gas to a house are properly turned; and if these stop-cocks are negligently left open by the tenant or servants when the gas-lights are not burning, and an explosion ensues, and injures the house, the tenant will be responsible for the injury. But if a thief enters the house in the absence of the tenant, and cuts and carries away a gas-pipe without the knowledge of the tenant, or against his will, the latter is not then responsible for the resulting damage. When the entry of gas into a house is under the control of the occupants of the house, the gas company supplying the gas is not bound, on receiving notice that no more gas will be required, to stop the supply from the outside by putting on an outer stop-cock, or cutting off the communication between the gas-pipes in the interior of the house and the main in the street. (*i*) In supplying gas to a house, a gas company is bound to use every reasonable precaution to prevent injury during the operation of "tapping the main." (*k*)

In an action for waste, it is no objection to the landlord's claim to substantial damages, or to the judgment of the court,

(*g*) *Countess of Shrewsbury v. Crompton*, 5 Co. 13 b; *Cro. Eliz.* 777; *Tindal, C. J.*, 4 M. & Sc. 253; *Horsefall v. Mather, Holt*, N. P. C. 9.

(*h*) "Fortuna autem ignis, vel hujusmodi eventus inopinati, omnes tenentes

excusat." — *FLETA*, lib. i. cap. 12, sect. 20.

(*i*) *Holden v. Liv. Gas Co.*, 3 C. B. 14; 15 Law J. C. P. 304.

(*k*) *Blenkiron v. Gt. Central Gas Consumers' Co.*, 2 F. & F. 433.

that the property has been improved in value by alterations made upon it, if those alterations have been made without the knowledge of the landlord, or in spite of his protest or objections. Thus, if a tenant convert a furze brake, in which game have bred, into arable or pasture land, by which its real value is much improved, but the landlord has objected to the improvement, preferring a furze brake with game to a cornfield without game, the landlord is entitled to substantial damages, (*l*) and to judgment, whatever may be the damages recovered. (*m*)

When the action is brought for a breach of duty by the defendant in omitting or neglecting to restore or rebuild a house which the defendant has undertaken to maintain and keep up, and which has been accidentally burnt or destroyed, the measure of damages is not the cost of rebuilding the house. In such a case the plaintiff can only recover the loss he has sustained by the actual deterioration of his property. And if the new house, when rebuilt, will be much more valuable to the plaintiff than the old house that was burnt or destroyed, the defendant is entitled to the benefit of the deduction of the increased value from the cost of the rebuilding. (*n*)

Damages recoverable from a Tenant who obstructs the Reversioner in the Exercise of his Right to enter upon the demised Premises to inspect Waste. — We have already seen that the law * gives to the lessor, or him who hath the [*255] reversion, liberty to enter upon the lands of his lessee, to see if there be waste, to the intent that he may have his action if there be cause for it; and, therefore, if the lessee prevents the inspection, substantial damages may be recovered from him by reason of the infringement of the lessor's right, although no waste has actually been committed or damage done. (*o*)

The courts will interfere by injunction to restrain lessees and mortgagees in possession from committing waste to the injury of the landlord or mortgagor, unless the wrongful act works a forfeiture of the estate, and the landlord has an immediate right of entry and fails to exercise it, (*p*) or unless the parties have by

(*l*) *Heath, J., Harrow School v. Alderton*, 2 B. & P. 86. 24 Law J. Exch. 226; *Lukin v. Godsall*, 2 Peake, 15.

(*m*) *Pindar v. Wadsworth*, 2 East, 161. (*o*) *Hunt v. Dowman*, Cro. Jac. 478.

(*n*) *Yates v. Dunster*, 11 Exch. 17; (*p*) *Luthropp v. Marsh*, 5 Ves. 259.

their contract assessed the compensation in the shape of an increased rent, or liquidated damages to be paid for the doing of the act, (*q*) and not as a cumulative remedy. (*r*)

Where a tenant from year to year received notice to quit, and then began to cut and damage the hedgerows, and to take manure off the land, and remove straw, &c., contrary to the course of good husbandry, the court granted an injunction to stop the mischief. (*s*) And where the tenant of a farm, having discovered valuable mineral deposits in a stream which ran from the Welsh mountains through his land, set to work to gather the minerals and sell them, the court granted a perpetual injunction to restrain him from so doing. (*t*) And so it will on a bill brought by a mortgagor, where the mortgagee in possession commits waste by cutting down timber, and the money arising from the sale of the timber is not applied in sinking the interest and principal of the mortgage. And where mortgagor in possession commits waste, the court will, on a bill by the mortgagee, grant an injunction, for they will not suffer a mortgagor to prejudice the incumbrance. (*u*)

Effect of Acquiescence in the Commission of Waste.—It is a principle of equity that when a person has stood by seeing an act done, and has consented to it, he cannot complain of that which he has himself expressly or impliedly authorized or permitted. Thus where the plaintiff had demised a logwood-mill to the defendant, and the latter altered it to a cotton-mill of great value, and the plaintiff stood by and saw the cotton-mill erected at great expense, and made no objection, and [* 256] afterward approved of the * defendant's planting about the mill, and the plaintiff then filed a bill for an injunction to restrain the defendant from using the mill as a cotton-mill, the court dismissed the bill, on the ground that the plaintiff had by his conduct encouraged the defendant to make the alteration. (*x*)

(*q*) *Woodward v. Gyles*, 2 Vern. 119; *Carnes v. Nesbitt*, 7 H. & N. 778; 30 Law J. Exch. 348; *Rolfe v. Peterson*, 2 Bro. P. C. 436.

(*r*) *London (City of) v. Pugh*, 4 Bro. P. C. 395.

(*s*) *Onslow v. —*, 16 Ves. 173.

(*t*) *Thomas v. Jones*, 1 Y. & C. 510.

(*u*) *Farrant v. Lovel*, 3 Atk. 722.

(*v*) *Brydges v. Kilburne*, cited *Jackson v. Cator*, 5 Ves. 688; *Harrow School v. Alderton*, *ante*, p. *254; *Rex v. Butterson*, 6 T. R. 555; *E. I. Co. v. Vincent*, 2 Atk. 82; *Parrott v. Palmer*, 3 Myl. & K. 640.

Of the Right of Property in Trees and Bushes. — According to the old authorities, the general property in trees is in the landlord, and that in bushes is in the tenant, although if he exceeds his right — as by grubbing up or destroying fences — he may be liable to an action for waste. The tenant has the general property in the cuttings of a hedge, whoever cuts it. (*y*)

Defeasible Leases. — The lessor may reserve to himself a right to determine the lease and resume possession of the demised premises at any time on giving notice of his intention to the lessee. (*z*) If a lease is made defeasible at the option of either of the parties, it may be determined by the lessor by a simple demand of possession, or the tenant may quit the demised premises and release himself from his contract by tendering possession to the landlord; but if the lease is made determinable at the expiration of three, six, or nine years, or any particular interval of time, reasonable notice of the intention to determine the contract must be given by the party who intends to avail himself of the power of defeasance. (*a*) If the lease is made determinable at the expiration of a certain time if the parties shall think fit, both must concur in determining the lease. (*b*) If power to determine the lease after a certain time is reserved, without saying by whom it is to be exercised, the law gives it to the lessee. (*c*) If an agreement is entered into for a yearly tenancy, with a proviso for determining it in the middle of the year, such a proviso does not prevent it from being a yearly tenancy. When the party is in, he is in of the whole estate for a year, liable to a defeasance on a particular event. So, where there is a lease for twenty-one years, determinable at the end of seven or fourteen years, the party, when he enters, is in of a term of twenty-one years, but a defeasible term, and which may determinate by matter *ex post facto*. (*d*) When the lease is determinable by notice, the notice may be given at any time, if no particular period for giving it is specified; (*e*) but it must be in strict

(*y*) *Berriman v. Peacock*, 9 Bing. 384.

(*z*) *Doe v. Kennard*, 12 Q. B. 244; *Liddy v. Kennedy*, L. R. 5 H. L. 134.

(*a*) *Goodright v. Richardson*, 3 T. R. 462.

(*b*) *Fowell v. Franter*, 34 L. J. Ex. 6.

(*c*) *Dann v. Spurrier*, 3 B. & P. 399.

(*d*) *Rex v. Herstmonceaux*, 7 B. & C. 555.

(*e*) *Bridges v. Potts*, 17 C. B. N. S. 314; 33 L. J. C. P. 338.

conformity with the terms of the power of defeasance ;
 [*257] and when *performance of all the covenants that have
 been entered into by the lessee is made a condition pre-
 cedent to his right to determine the lease, these covenants must
 be strictly fulfilled. (*f*)

Disclaimer and Forfeiture. — If a tenant from year to year dis-
 claims the title of his lessor ; if he claims the land as his own, and
 refuses to pay rent on the ground that he is himself the owner,
 or if he attorns or delivers up possession to a stranger, or professes
 to sell or grant the property to another ; if he cuts down tim-
 ber, pulls down or alters dwelling-houses, or obliterates fences,
 boundaries, and landmarks, or opens and digs mines and quarries
 against the will of the landlord, the tenancy is determinable by
 the latter, and he has a right of re-entry upon the property, and
 may forthwith recover possession of the demised premises. (*g*)
 Acts of this description on the part of a tenant from year to
 year work a forfeiture of his term and interest, and convert the
 possession into an adverse possession, so that the tenant may at
 once be proceeded against without any notice to quit and with-
 out any demand of possession. (*h*) But if the lessor dies, and
 adverse claimants to the property appear and demand the rent
 of the tenant, and the latter refuses to pay it until the conflict-
 ing claims have been ascertained and settled, the refusal is not
 such a disclaimer of the title of the real owner as will justify
 the latter in treating the tenant as a trespasser. (*i*) “To consti-
 tute a disclaimer (by words), there must be a renunciation by
 the party of his character of tenant, either by setting up the title
 of a rival claimant, or by asserting a claim of ownership in him-
 self.” (*k*) A mere refusal to pay rent, or a declaration by the
 tenant that he will continue to hold possession, or an omission
 to acknowledge the landlord as such by requesting further infor-
 mation as to title when the property has changed hands, does not

(*f*) *Friar v. Grey*, 15 Q. B. 899; 5
 Exch. 584.

(*g*) *Jones v. Mills*, 10 C. B. N. S. 788;
 31 L. J. C. P. 66.

(*h*) *Doe v. Frowd*, 1 M. & P. 480; 4
 Bing. 557; *Doe v. Flynn*, 1 C. M. & R.
 137; *Doe v. Pittman*, 2 N. & M. 673;
Vivian v. Moat, 16 Ch. D. 730.

(*i*) *Doe v. Pasquali*, 1 Peake, 259;
Swinfen v. Bacon, 6 H. & N. 846; 30
 L. J. Ex. 368.

(*k*) *Doe v. Cooper*, 1 Sc. N. R. 41;
Hunt v. Allgood, 30 L. J. C. P. 313; 10
 C. B. N. S. 253.

render the tenancy an adverse tenancy and possession. (*l*) All verbal disclaimers operating as a forfeiture of the tenant's interest in and right of possession of the demised premises, and dispensing with the necessity of a notice to quit, are restricted to tenancies from year to year. A lease for a definite term of years cannot be forfeited by mere words. (*m*) And if, after a disclaimer by a tenant from year to year, the landlord puts in a distress for rent which became due subsequently to the disclaimer, such distress is a waiver of the disclaimer, and again clothes the * tenant with a lawful possession. (*n*) [*258] Forfeiture is also incurred by the breach of conditions annexed to the demise; for the lessor, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they are not illegal or repugnant to the grant itself, and upon the breach of those conditions may avoid the lease. (*o*) But the law does not favor forfeitures of estates; and strict proof of a breach of a condition or covenant working a forfeiture of a lease is always required. (*p*)

Provisos for Re-entry. — It is frequently made a term or condition of the demise that the lease shall be forfeited and the lessor have a right to re-enter and re-possess himself of the demised premises for a breach of particular covenants contained in a lease. The right to take advantage of a proviso of this description is, of course, confined to the lessor and the assignee of the reversion or part of the reversion; (*q*) and the lessee cannot be permitted to set up his own breach of contract as an avoidance of the lease; for no man is permitted to take advantage of his own wrong. (*r*) If it is provided that, in case of non-payment of rent, it shall be lawful for the lessor "to enter upon the premises for the same until it be fully satisfied," the lessor will be entitled to enter and hold possession until the arrears of rent are satisfied; but when they are satisfied, the lessee will be entitled to re-enter and hold under the lease as before. (*s*) It

(*l*) *Doe v. Cawdor*, 1 C. M. & R. 398; (*q*) 22 & 23 Vict. 35, sect. 3.
Doe v. Stanion, 1 M. & W. 703. (*r*) *Reid v. Parsons*, 2 Chit. 248; *Doe*
(*m*) *Doe v. Wells*, 10 Ad. & E. 436. *v. Birch*, 1 M. & W. 402; *Jones v. Car-*
(*n*) *Doe v. Williams*, 7 C. & P. 322. *ter*, 15 M. & W. 725.
(*o*) *Bac. Abr. Leases*, T. 2. (*s*) *Co. Litt.* 203; *Doe v. Bowditch*,
(*p*) 1 Wms. Saund. 287 b, 288 i; 1 15 L. J. Q. B. 267.
Mad. c. 36.

should seem that a power of re-entry upon the lessee "wilfully failing or neglecting to perform" any covenant, does not apply to a breach of a negative covenant, (*t*) but a power to re-enter if the lessee does not "observe, perform, and keep" the covenants, does apply to a breach of a negative covenant. (*u*) Provisos in leases for re-entry in case of non-payment of rent or non-performance of covenants are not "to be construed with the strictness of conditions at common law; but, being matters of contract between the parties, they should be construed like all other contracts." (*x*) Where the lessee was to hold in consideration of the rent "and conditions" contained in the lease, and it was stipulated and "conditioned" that the lessee should not assign or underlet, it was held that the lease was forfeited, and that the lessor had a right to re-enter, on an assignment being made by the lessee. (*y*) An agreement to hire a messuage at a certain rent is an agreement to pay that rent; and, therefore, [*259] if a power of re-entry is reserved "in case of breach of any of the agreements" contained in the written instrument of demise, the lessor may re-enter for non-payment of rent. (*z*) Where a lessee covenanted to pay rent and not to assign, and there was a proviso for re-entry if the rent was in arrear, or all or any of the covenants "hereinafter contained" on the part of the lessee should be broken, and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor, that the lessee paying the rent, &c., should quietly enjoy, it was held that the lessor could not enter for breach of the covenant not to assign, as the proviso was restrained by the word "hereinafter" to subsequent covenants, and there were none such in the lease. (*a*) Where there is a proviso for re-entry in case of non-performance of covenants, and the lease contains a general covenant to repair, and also a covenant to repair within a certain time after notice, the landlord may at once enter for breach of the general covenant; (*b*)

(*t*) *Hyde v. Warden*, 3 Ex. D. 72,
C. A.

(*u*) *Evans v. Davis*, 10 Ch. D. 747.

(*x*) *Doe v. Elsam*, M. & M. 191;
Hayne v. Cummings, 16 C. B. N. s. 537.
425.

(*y*) *Doe v. Watt*, 8 B. & C. 308.

(*z*) *Doe v. Kneller*, 4 C. & P. 3.

(*a*) *Doe v. Godwin*, 4 M. & S. 265.

(*b*) *Baylis v. Le Gros*, 4 C. B. N. s.

but if he gives notice under the second covenant, this is a waiver of the forfeiture incurred by breach of the general covenant, and he cannot recover possession until after the time limited by the notice has expired. (c) A notice to repair "in accordance with the covenants," or "forthwith," will not, however, amount to a waiver of the forfeiture incurred by a breach of the general covenant. (d) Where a right for re-entry for waste is reserved, the proviso is understood to mean such waste as is injurious to the reversion. (e) Where there is a proviso for re-entry for breach of a covenant to insure and keep insured, it does not mean that the lessee shall keep any one particular policy on foot, but that he shall always keep the premises insured by some one policy or another; and the breach will be a continuing breach so long as they remain uninsured. (f)

A power of re-entry, in case the lessee carries on any trade or business upon the demised premises, authorizes the lessor to re-enter if a school is established. (g) But when particular trades or occupations are specified, no trade or business which does not clearly fall within the description contained in the lease will come within the proviso. (h) A proviso for re-entry may be reserved in case the tenant should become bankrupt or insolvent, (i) or the term granted should be taken in execution by the sheriff; (k) and * if the contingency provided for hap- [* 260] pens, the lessor will be entitled to take possession and to enjoy the emblements. (l) If a proviso for re-entry is insensible, it is of course nugatory; for the court cannot find a meaning for that which has no meaning. (m) If the lessor has the custody of the lease, and has in any wise misrepresented the nature of the proviso, or of the covenants to be fulfilled, or has withholden any necessary information from the lessee, or done anything to entrap the latter into a forfeiture, the law will not permit the lessor to avail himself of such forfeiture; for that

(c) *Doe v. Meux*, 4 B. & C. 606.(d) *Few v. Perkins*, L. R. 2 Ex. 92; 36 L. J. Ex. 54; *Roe v. Paine*, 2 Campb. 520.(e) *Doe v. Bond*, 5 B. & C. 855.(f) *Doe v. Peck*, 1 B. & Ad. 428.(g) *Doe v. Keeling*, 1 M. & S. 95.(h) *Jones v. Thorne*, 1 B. & C. 715.(i) *Roe v. Galliers*, 2 T. R. 133; *Doe v. Ingleby*, 15 M. & W. 465.(k) *Rex v. Topping*, M'Clel. & Y. 544.(l) *Davis v. Eyton*, 7 Bing. 154.(m) *Doe v. Carew*, 2 Q. B. 317.

would be permitting him to take advantage of his own wrong. (*n*) When a party is let into possession under an agreement for a future lease, which is to contain certain covenants and a proviso for re-entry in case of the non-performance of those covenants, the tenant holds, as we have before seen, subject to all such of the terms of the intended lease as are applicable to a yearly tenancy; and if, before the lease is granted, the lessee does an act which would have worked a forfeiture of the lease had it been granted, the landlord will have a right to re-enter, and may forthwith recover possession. (*o*)

Effect of Re-entry on the Lessee's Liability on his Covenants. — The forfeiture of the lease does not extinguish the liability of the lessee in respect of breaches of covenant that had accrued at the time of the forfeiture, so that the lessor, by taking advantage of the forfeiture and re-entering, does not deprive himself of his remedies upon the covenants of the lease for any breach of those covenants up to the time of the re-entry. (*p*) If the landlord does not think fit to avail himself of the forfeiture, the liability of the lessee upon the covenants of the lease remains unaffected by the forfeiture; but if the landlord brings an action of ejectment, he cannot, in general, sue the lessee in respect of breaches of covenant that have accrued subsequently to the commencement of the action. (*q*)

Waiver of a Forfeiture. Lessor's Right of Election. — The right of entry for forfeiture of a lease is governed by the general law that where a man has got a right to elect to do a thing to the injury of another, his election, when once made, is final and conclusive, and he cannot afterward alter his determination. If, therefore, a lease has been forfeited, and there is an election on the part of the landlord to enter and defeat the lease or not as he pleases, and he by word or act manifests his intention that the lease shall continue, he waives the forfeiture, and cannot afterward annul the lease. If, knowing of a forfeiture, he nevertheless tells his tenant that he is still tenant, and that he shall hold him to the covenants and

(*n*) *Doe v. Rowe*, Ry. & Mood. 346.

(*p*) *Hartshorne v. Watson*, 5 Sc. 506;

(*o*) *Doe v. Amey*, 12 Ad. & E. 476; 4 Bing. N. C. 178.

Doe v. Ekins, Ry. & M. 2^d; *Hayne v. Cumming*, 16 C. B. N. S. 421.

(*q*) *Jones v. Carter*, 15 M. & W. 718.

stipulations of his lease, the election is made, and the landlord cannot afterward enter for the forfeiture. (*r*) On the other hand, if he brings ejectment for the forfeiture, he unequivocally declares his election to determine the lease; and a subsequent distress is no waiver of the forfeiture. (*s*) Acceptance of rent, or demand of rent, or the bringing of an action for rent, or distraining for rent, accruing due after a forfeiture, will be considered as strong evidence of the lessor's determination to continue the lease and waive the forfeiture, if it appears that at the time the lessor received the rent, he had notice of the breach of the condition. (*t*) A forfeiture for not repairing may be waived by the receipt of rent which became due after the right of entry accrued, but not by the receipt of rent becoming due before the expiration of a notice to repair. A forfeiture is suspended, but not waived, by allowing a tenant further time to repair. (*u*) A waiver of one forfeiture does not prevent the lessor from availing himself of subsequent forfeitures; (*x*) and a receipt of rent is no waiver of a continuing breach of a covenant to repair. (*y*) Where a breach of covenant has continued upwards of twenty years with full knowledge of it on the part of the lessor, and no attempt has been made to take advantage of it, neither the lessor nor his assignee can avail himself of the breach to work a forfeiture. (*z*)

Relief against Forfeiture. Breach of Covenants or Conditions respecting Insurance or Payment of Rent. — With respect to leases made before or after the commencement of the act, and notwithstanding any stipulation to the contrary, relief will now be given against forfeiture (except in cases of non-payment of rent, or breach of covenant not to assign or underlet, or bankruptcy or execution), (*a*) unless notice has been given requesting the lessee to remedy the breach and make compensation, and

(*r*) *Ward v. Dav*, 33 L. J. Q. B. 13, 254; 4 B. & S. 337; 5 B. & S. 359.

(*s*) *Grimwood v. Moss*, L. R. 7 C. P. 360; 41 L. J. C. P. 239.

(*t*) *Bac. Abr. Leases*, tit. 2; *Ward v. Day*, *supra*; *Denby v. Nicholl*, 4 C. B. n. s. 376; *Croft v. Lumley*, 27 L. J. Q. B. 321; *Cotesworth v. Spokes*, 30 L. J. C. P. 221; *Pellatt v. Boosey*, 31 L. J. C. P. 281.

(*u*) *Doe v. Meux*, 4 B. & C. 606; and see *Few v. Perkins*, *ante*, p. * 259.

(*x*) *Doe v. Bliss*, 4 Taunt. 735; 23 & 24 Vict. c. 38, sect. 6.

(*y*) *Doe v. Jones*, 5 Exch. 498; 19 L. J. Ex. 405.

(*z*) *Gibson v. Doey*, 2 H. & N. 615.

(*a*) And in a mining lease, except covenants for access to books, &c. As to forfeiture for non-payment of rent, see 23 & 24 Vict. c. 126, sect. 1.

the lessee has failed to comply. (b) No relief would formerly be granted in the case of forfeiture for the breach of any [* 262] covenant other than * covenants to pay rent or insure, except in the case of accident, mistake, or fraud, (c) or where the tenant has been misled by the conduct of the landlord amounting to a waiver. (d)

Assignment after Forfeiture.—A right of entry which has accrued on a forfeiture cannot be assigned; and the assignee of the reversion, therefore, cannot take advantage of any forfeiture incurred before the assignment; but he is entitled to the benefit of the covenant and of the condition of re-entry in respect of any subsequent or continuing breach. (e)

Surrender. — Deeds and Agreements of Surrender.¹ — We have already seen that a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, is void unless it is made by deed (*ante*, p. * 179). An estate for life or years, which cannot be created without deed, cannot be surrendered without deed. (f) But if the estate may be created, and has been created, without deed, it may be surrendered without deed. (g) It is said that a surrender under seal immediately divests the estate out of the surrenderor and vests it in the surrenderee; for this is a conveyance at common law, to the perfection of which no other act is requisite but the bare grant; and though it be true that every grant is a contract, and there must be an *actus contra actum*, or a mutual consent, yet that consent is implied. A gift imports a benefit; and an *assumpsit* to take a benefit may well be presumed; and there is

¹ On surrender, see Tayl. Land. & Ten. sects. 507–518; Wood, Land. & Ten. c. 44; also sect. 232; McAdam, Land. & Ten. 2d ed. c. 26.

For the decisions, see U. S. Dig. tit. *Landlord & Tenant*, sects. 135, 912; also, Kerr v. Simmons, 8 Mo. App. 431; Dayton v. Craik, 26 Minn. 133; Smith v. Pendergast, ib. 318; Deane v. Caldwell, 127 Mass. 242; Roe v. Conway, 74 N. Y. 201; Kittle v. St. John, 7 Neb. 73; Ladd v. Smith, 6 Oreg. 316.

(b) 44 & 45 Vict. c. 41, sect. 14; the lessee may apply for relief in an action by the lessor. (c) Crane v. Batten, 23 Law T. R. 220.

(d) Gregory v. Wilson, 9 Hare, 689. (f) Shep. Touch. 397, *Defeasance*; Co. Litt. 338 a; 1 Wms. Saund. 236 a; Perkins v. Perkins, Cro. Eliz. 269; Lyon v. Reed, 13 M. & W. 310.

(g) Hughes v. Met. Ry. Co., 2 Ap. Cas. 439. (g) Farmer v. Rogers, 2 Wils. 26.

the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest the property. (*h*) But this must be understood only of surrenders of particular estates which are manifestly beneficial to the surrenderee. If the benefit is equivocal, there will be no implied assent or acceptance, and the surrender will be nugatory without the express concurrence of the surrenderee (*post*, p. * 264). If the tenant holds under a parol demise for a term not exceeding three years, the term may be surrendered by an agreement in writing signed by the surrenderor and the surrenderee, provided it is intended to have an immediate effect. There cannot be a surrender to take place *in futuro*. If anything is to be done by either or both of the parties before the estate of the termor is to be extinguished, the transaction amounts only to a covenant or agreement to surrender, and there is no actual surrender by the tenant, and no right of entry on the part of the

* landlord by the mere force of the contract. (*i*) An [* 263] insufficient notice to quit, therefore, accepted in writing under the landlord's signature, does not of itself amount to a surrender of the term if it is to operate *in futuro*. (*k*) But an agreement between a landlord and a tenant holding a parol demise from year to year, that the tenancy should be determined, followed by the departure of the tenant, and an entry and taking of possession on the part of the landlord, becomes an actual surrender by act and operation of law. (*l*) Where a dispute arose between a yearly tenant and the landlord, and the tenant said to the landlord, "I shall quit," and the latter said, "You may do so, and I shall be glad to get rid of you," and the tenant then removed her furniture and sent the keys of the house to the landlord, and the latter accepted them and took possession, it was held that there was a surrender of the lease by operation of law. (*m*) But the mere delivery and acceptance of the key,

(*h*) *Thompson v. Leach*, 2 Salk. 617.

(*i*) *Coupland v. Maynard*, 12 East, 134; *Weddall v. Capes*, 1 M. & W. 51; *Forquet v. Moore*, 7 Exch. 870; 22 L. J. Ex. 35.

(*k*) *Johnstone v. Huddlestons*, 7 D. & R. 419; 4 B. & C. 922; *Doe v. Milward*, 3 M. & W. 332.

(*l*) *Dodd v. Acklom*, 7 Sc. N. R. 423; 2 Smith's Leading Cas. 5th ed. 713-719; *Furnivall v. Grove*, 30 L. J. C. P. 3.

(*m*) *Grimman v. Legge*, 8 B. & C. 324; *Phenè v. Popplewell*, 12 C. B. N. S. 334; 31 L. J. C. P. 235; see also *Oastler v. Henderson*, 2 Q. B. D. 575.

without any entry on the demised premises and taking of possession by the landlord, would be no evidence of a surrender; (*n*) and an abandonment of the demised premises by the tenant, and an entry of the landlord thereon for the purpose of repairing them, or airing or drying the rooms, or letting them, and not with a view of taking possession as owner, will not, of course, amount to a surrender. (*o*)

Surrenders by Act and Operation of Law "take place where the owner of a particular estate has been a party to some act, the validity of which he is afterward estopped from disputing, and which would not be valid if his particular estate had continued to exist. Thus if lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former lease. So if there be tenant for life, remainder to another in fee, and the remainder-man comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainder-man; and so the law says that such acceptance of livery amounts to a surrender of his life estate.

[*264] Again, if tenant for * years accepts from his lessor a grant of a rent issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent; and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor. The acts *in pais* which bind parties by way of estoppel are all acts which anciently were, and in contemplation of law have always continued to be, acts of notoriety not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining: and then the legal consequences followed." (*p*) But if the ori-

(*n*) *Cannan v. Hartley*, 19 L. J. C. P. 323.

(*p*) *Lyon v. Reid*, 13 M. & W. 306; 2 Smith's Lead. Cas. 5th ed. 714-720.

(*o*) *Bessell v. Landsberg*, 7 Q. B. 638; *Griffith v. Hodges*, 1 C. & P. 419.

ginal lease is under seal, the acceptance by the lessee of a mere parol demise from the lessor will not amount to a surrender of such original lease; (*q*) and if the new lease is wholly or partially invalid, and does not pass an interest according to the contract and the intention of the parties, it will not operate as a surrender of the former lease. (*r*) A mere agreement for an increased rent will not have the effect of creating a new tenancy. (*s*)

Substitution of a New Tenant in the Place of the Original Tenant. — When there is an open and notorious shifting of the actual possession of corporeal property, in execution of an agreement between the lessor and lessee and a third party, to substitute such third party as the lessee in the place of the original lessee, there is a surrender by operation of law of such original lease. (*t*) But a mere agreement for the substitution of a new tenant, not followed up by any actual change of possession, or a mere change of possession unaccompanied by an agreement of substitution, does not amount to a surrender. (*u*) It must be shown that the incoming tenant has been expressly received and accepted by the landlord as his lessee, in the place and stead of the original lessee, by the mutual agreement of all parties; (*x*) for the mere change of the possession is no evidence of the grant and acceptance of a new lease, the *prima facie* presumption being that the incoming tenant has entered and taken possession as the under-tenant or assignee of the original lessee. (*y*) The mere * circumstance of the landlord's having accepted rent [* 265] from an assignee or under-tenant in possession of the demised premises is no evidence of an acceptance of such assignee or under-tenant as his lessee in the place of the original lessee,

(*q*) Shep. Touch. 397.

(*r*) Doe v. Poole, 11 Q. B. 713; 17 L. J. Q. B. 143; Doe v. Courtney, ib. 702, 151.

(*s*) Geeckie v. Monk, 1 C. & K. 307; Doe v. Geeckie, 5 Q. B. 841; Crowley v. Vitty, 7 Exch. 319.

(*t*) Davison v. Gent, 1 H. & N. 744; 26 L. J. Ex. 122; Nickells, or Nicholls, v. Atherstone, 10 Q. B. 944; 16 L. J. Q. B. 371; Reeve v. Bird, 1 C. M. & R. 31; Walls v. Atcheson, 11 Moore, 379;

Woodcock v. Nuth, 1 M. & Sc. 317; Thomas v. Cook, 2 B. & Ald. 120.

(*u*) Taylor v. Chapman, Peake's Add. Cas. 19; Cocking v. Ward, 1 C. B. 868; Kelly v. Webster, 12 C. B. 283; 21 L. J. C. P. 163.

(*v*) Graham v. Whichelo, 1 Cr. & M. 194; M'Donnell v. Pope, 9 Hare, 707; Matthews v. Sawell, 2 Moore, 262; 8 Taunt. 270.

(*y*) Doe v. Williams, 9 D. & R. 30; 6 B. & C. 41.

the *prima facie* presumption being that the rent was paid by the latter as the agent of the original lessee and on his behalf. (z)

Surrender and Acceptance of Surrender by Joint-Tenants.—

Every act done by one joint-tenant which is for the benefit of his companions will bind them; but those acts which prejudice his companions in estate will not bind them; and if the benefit be doubtful, two joint-tenants have no right to elect for the third. A surrender, therefore, or acceptance of a surrender, by one of several joint-tenants, will not, in general, bind the others. (a) If, however, one of two joint-lessors lies by and allows the other to act for him, and acquiesces in the acts of his co-owner, and intrusts the whole management of the business in which they are jointly interested to him, he will be bound by his acts. (b)

Non-extinguishment by Surrender of Derivative Estates.— If a lessee from year to year grants an underlease of part of the premises demised to him, and then surrenders his term, the surrender will not destroy the estate and interest of the underlessee, if the latter has not concurred in and been a party to the surrender. (c)

Effect of the Surrender on Existing Breaches of Covenant.—

The mere surrender of the lease does not relieve the lessee from his liability in respect of breaches of covenant that have accrued prior to the surrender. The lessor, therefore, after a surrender remains a specialty creditor for all arrears of rent which become due, before the surrender, upon the lessee's covenants for the payment of rent. (d)

Notice to quit, when necessary.— “When a lease is determinable on a certain event or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term.” (e) If, therefore, a lease is granted for a term of years, or for one year only, no notice to quit is necessary at the end of the term; (f) but if the tenancy is from

(z) *Copeland v. Gubbins*, 1 Stark. 96; *Doe v. Wood*, 15 L. J. Ex. 41.

(a) *Right v. Cuthell*, 5 East, 498.

(b) *Dodd v. Acklom*, 7 Sc. N. R. 415; 6 M. & Gr. 672.

(c) *O. Litt.* 338 b; 4 Geo. II. c. 28, sect. 6; *Pleasant v. Benson*, 14 East, 237; *Cousins v. Phillips*, 3 H. & C. 892;

35 L. J. Ex. 84; *Gt. Western Ry. Co. v. Smith*, 2 Ch. D. 235; s. c. 3 Ap. Cas. 165.

(d) *Attorney-General v. Cox*, 3 H. L. C. 240.

(e) *Right v. Darby*, 1 T. R. 162; *ib.* 54.

(f) *Cobb v. Stokes*, 8 East, 358.

year to year, a half-year's notice must be given on either side, in order to determine the tenancy, and this notice may be given in the first as well as in any subsequent year of the tenancy. (*g*) If a * man holds under an agreement for a [* 266] lease, or under a lease void by reason of its not having been made by deed, for the full term intended to have been granted, an ejectment may be brought against him at the expiration of such term without any notice to quit. (*h*) In the case of a tenancy-at-will no notice to quit is necessary; but there must be a formal demand of possession, or notice of the determination of the will, on the part of the landlord, before any action of ejectment can be brought. (*i*) The tenant-at-will, too, in order to discharge himself from his liability for rent, or for a reasonable compensation for the use and enjoyment of the demised premises, must give notice to the landlord of the fact of his abandonment of the possession, and of his election to rescind the contract and put an end to the tenancy. If the occupation is the occupation of a servant or agent holding possession of the premises on account and on behalf of his master or principal, the possession of the occupier is the possession of the owner himself, and the latter may at any time remove the tenant, and resume possession of the property without any notice to quit. (*k*) If the tenancy and possession are adverse, or if the occupier holds over after the expiration of a lease, or after a forfeiture, or after an agreement for a lease or a contract of sale has gone off and been abandoned, or after the tenancy has been determined by a dissolution of partnership, and continues in possession without the permission and against the will of the owner, no notice to quit is necessary; but the owner may at once proceed against the wrong-doer by action of ejectment for the recovery of the demised premises, or he may enter and take possession if the tenant leaves the demised premises vacant. (*l*)

(*g*) *Doe v. Smaridge*, 7 Q. B. 959; *Doe v. Nainby*, 16 L. J. Q. B. 303; *Doe v. Geeckie*, 5 Q. B. 841.

(*h*) *Doe v. Stratton*, 1 M. & P. 187; *Tress v. Savage*, 4 E. & B. 36; 23 L. J. Q. B. 339.

(*i*) *Right v. Beard*, 13 East, 210; *Denn v. Rawlins*, 10 East, 261; *Doe v. Cox*, 11 Q. B. 122; 17 L. J. Q. B. 3.

(*k*) *Doe v. Derry*, 9 C. & P. 494; *Mayhew v. Suttle*, 4 E. & B. 347; 24 L. J. Q. B. 54; *White v. Bailey*, 30 L. J. C. P. 253.

(*l*) *Doe v. Sayer*, 3 Camp. 8; *Doe v. Miles*, 1 Stark. 181; *Doe v. Bluck*, 8 C. & P. 464.

If the lessor is only tenant-at-will, or has made a prior lease of the lands, or mortgaged them so as to give the mortgagee a right of entry and to deprive himself of the power of granting a lease for the term specified, the tenant may be turned out without any previous notice to quit from the party who has title. (*m*) But if the lessor at the time of making of the lease had full right and title to grant the demised premises to the lessee for the term, any subsequent grant, mortgage, sale, or lease cannot affect the tenant's right of possession, or in any way dispense with the ordinary notice to quit.

How the Notice may be given, and by Whom. — A [* 267] notice to quit * may be given orally by the lessor or by his agent, (*n*) unless there has been an express agreement or stipulation for a notice in writing. (*o*) A mere receiver of rents has no implied authority to give a notice to quit; but an agent or receiver who is intrusted with the general management of landed property, and has a general authority to let lands from year to year, has also authority to determine such tenancies by a notice to quit. (*p*) And he may give the notice in his own name, as it is not necessary that his agency and the authority of his principals should appear on the face of the document. (*q*) The steward of a corporation who is intrusted with the letting of the corporate estates, may give a notice to quit, and needs no authority under seal from the corporation for the purpose. (*r*) If there are several joint-lessors or joint-owners of the property, a notice to quit given or signed by one or more of them on behalf of all, is sufficient; (*s*) and the subsequent assent of such joint-owners to a notice previously given by one or more of them on behalf of all, is equivalent to a precedent authority. (*t*) But if it is expressly provided by the agreement of the parties that a written notice shall be given by all of them under their respective hands, the notice must be signed by all, and a ratification given afterward will not do. (*u*) The notice may also be given

(*m*) *Keech v. Hall*, 1 Doug. 21.

(*n*) *Timmins v. Rawlinson*, 3 Bur. 1603; *Doe v. Crick*, 5 Esp. 196.

(*o*) *Legg v. Benion*, Willes, 43.

(*p*) *Doe v. Mizem*, 2 M. & Rob. 56.

(*q*) *Jones v. Phipps*, L. R. 3 Q. B. 567; 37 L. J. Q. B. 198.

(*r*) *Roe v. Pierce*, 2 Campb. 96.

(*s*) *Doe v. Hulme*, 2 M. & R. 433; *Doe v. Summersett*, 1 B. & Ad. 135; *Alford v. Vickery*, 1 Car. & M. 280.

(*t*) *Abbott, C. J.*, 3 B. & Ald. 692.

(*u*) *Right v. Cuthell*, 5 East, 497.

by an agent on their behalf; but such notice, in order to be valid and effectual, must be given in the names of the joint-owners, the principals, and not in the name of the agent, unless the agent has a general authority to let their lands. (*x*) And the agent ought to have authority to give the notice at the time it begins to operate; for if the tenant could not safely have acted upon the notice at the time it was given, no subsequent recognition of it by the landlord will make it valid. (*y*) If one or more of several joint-owners dissent from the notice, such of them as have joined in giving the notice to quit are entitled to enter into and hold possession of the demised premises and receive the rents and profits of the land, jointly with the tenant or lessee of the others who have refused to join in such notice. (*z*)

Form and Effect of the Notice — Alternative and Peremptory Notices. — A notice to quit "all the property you hold of me," addressed to the tenant, is a sufficient description of the demised premises; and any general description applicable to the whole of * the property will suffice. (*a*) But a landlord [* 268] cannot give a notice to quit which is intended to apply to a part only of premises which have been demised together at one entire rent. (*b*) A mere misdescription, however, of the premises comprised in the notice to quit, or a mistake in the Christian name of the tenant to whom such notice is addressed, does not invalidate the notice, provided the tenant has not been misled or prejudiced by such misdescription or mistake. If the notice applies to a year that is past, but was clearly intended to apply to the coming year, and the tenant must have known what time was meant, he is bound by the notice. (*c*) If the notice is not a peremptory notice to quit, but is drawn up in

(*x*) *Jones v. Phipps*, *supra*.

(*y*) *Doe v. Walters*, 10 B. & C. 626; 5 M. & R. 357; *Doe v. Goldwin*, 2 Q. B. 146; *Goodtitle v. Woodward*, 3 B. & Ald. 689.

(*z*) *Doe v. Chaplin*, 3 Taunt. 120.

(*a*) *Doe v. Church*, 3 Campb. 71.

(*b*) *Doe v. Archer*, 14 East, 245; except under the Agricultural Holdings Act, 38 & 39 Vict. c. 92, sect. 52, where

a tenancy from year to year may be determined by notice as to part of the holding if for the purpose of making certain improvements; see some of the provisions of this act, *post*, p. * 283.

(*c*) *Doe v. Roe*, 4 Esp. 185; *Doe v. Wilkinson*, 12 Ad. & E. 743; 4 P. & D. 323; *Doe v. Spiller*, 6 Esp. 70; *Doe v. Kightley*, 7 T. R. 63.

the alternative, and seems to have been intended either to put an end to the lease or obtain an increased rent, the tenant may elect to remain in possession, paying an increased rent; and, such an option having been accorded to him, he cannot, if he chooses to occupy, be treated as a trespasser and wrong-doer and turned out of possession. If, however, the notice is a notice to quit or pay double the annual value under the statutes imposing penalties on tenants for holding over after a notice to quit, the alternative notice so given will be construed as a peremptory notice to quit, accompanied by a warning to the tenant of the penal consequences of disobedience, and not as an offer on the part of the landlord of a new bargain and a new lease at an increased rent. (*d*) And where a notice to quit on a day terminating the tenancy went on to say, "And I hereby further give you notice that, should you retain possession of the premises after the day before mentioned, the annual rental of the premises now held by you from me will be £160, payable quarterly in advance," it was held by Bramwell and Cotton, L. J.J., Brett, L. J., dissenting, that the notice was not rendered invalid by the addition. (*c*)

Length of the Notice. — We have already seen that, in the case of a tenancy from year to year, six calendar months' notice to quit is required to be given prior to the expiration of the current year of hiring, in order to determine the tenancy between the parties. (*f*) But whenever the tenancy commences and ends at any of the usual feasts, the customary half-year intervening between two half-yearly feasts constitutes a half-
[*269] year's notice, although the * intermediate time be not exactly six calendar months. (*g*) And where the tenancy commenced on a feast-day, and notice was given on the 26th of March to quit on the 29th September, it was held bad, although there were more than 183 days intervening. (*h*) Although rent may be payable under the lease on the usual feast-

(*d*) *Doe v. Jackson*, 1 Doug. 175.

(*c*) *Ahearn v. Bellman*, 4 Ex. D. 201.

(*f*) *Aule*, p. *265; but see *Rogers v. Kingston-upon-Hull Dock Company*, 34 L. J. Ch. 165.

(*g*) *Howard v. Wemsley*, 6 Esp. 53;

4 ib. 199; *Rogers v. Hull Dock Company*, 34 L. J. Ch. 165.

(*h*) *Morgan v. Davies*, 3 C. P. D. 260; see also *Wilkinson v. Calvert*, 3 C. P. D. 360.

days, yet the length of notice required by the terms of the lease may be six calendar months, in which case a notice given on the 29th September to quit on the 25th March would be bad, as there were not six calendar months intervening. Under the Agricultural Holdings Act, 1875, (*i*) where a half-year's notice, expiring with the year of the tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall, by virtue of this act, be necessary, and sufficient for the same. It has been held that this does not apply to a yearly tenancy where, by express agreement, (*k*) the tenancy is determinable on *six months'* notice, not a *half-year's* notice. (*l*)

Of the Time of Quitting specified in the Notice. — If the time at which the tenant is to quit is specified in the notice, care must be taken to make such time correspond with the termination of the term of hiring, unless the notice is given in the exercise of a power to determine the tenancy expressly reserved in the lease or agreement; (*m*) for if the term expires at one period, and the notice is to quit at another, such notice is bad, and the lessor cannot safely act upon it. (*n*) If a tenant holds possession of a house as a tenant from year to year under an agreement to quit at a quarter's notice, the tenant cannot be expelled at the expiration of any quarter that the lessor may choose to select, but the notice must be a quarter's notice to quit at the expiration of the current year. (*o*) If the hiring is from half-year to half-year, determinable by six months' notice to quit, the tenancy may be determined by notice at the expiration of any half-year. (*p*) If it is a quarterly, a monthly, or a weekly hiring, the notice must be a notice to quit at the expiration of the current quarter, month, or week; if it breaks into the middle of the quarter, month, or week, it is not a good notice to quit. If the hiring is from month to month, and the rent is made payable weekly, a notice to quit at the expiration of the current month must be given,

(*i*) 38 & 39 Vict. c. 92, sect. 51; see some of the provisions of this act stated, *post*, p. * 283.

(*k*) Sect. 54.

(*l*) *Wilkinson v. Calvert*, 3 C. P. D. 360.

(*m*) *Bridges v. Potts*, 17 C. B. N. S. 214; 33 L. J. C. P. 333.

(*n*) *Doe v. Lea*, 11 East, 312.

(*o*) *Doe v. Donovan*, 1 Taunt. 555.

(*p*) *Doe v. Grafton*, 18 Q. B. 496; 21 L. J. Q. B. 276.

[*270] and not a notice expiring at any one of the * weeks without reference to the termination of the month. The length of the notice, however, may be varied by local custom and usage, and by the agreement of the parties. When the hiring is for one single quarter, month, or week, no notice at all is requisite. (*q*) The term will, in the absence of an express agreement to the contrary, be taken to commence at the time of the tenant's entering and taking possession of the demised premises.

A notice "to quit at the end of the first year of your tenancy, which expires half a year after the date of this notice," will be sufficient, and so also will a notice "to quit at the expiration of the current year of your tenancy," provided such notice was given half a year prior to the expiration of the current year of hiring. (*r*) Sometimes the notice is given in the alternative, in order to hit one of two periods on which the term is known to end, and it has been held that such a notice is a perfectly good notice, and possesses all the certainty that is reasonably requisite for the information of the tenant. (*s*) A notice to a weekly tenant, whose tenancy commenced on Wednesday, to quit on Friday, provided his tenancy commenced on Friday, or otherwise at the end of his tenancy next after one week from the date thereof, was held to be a good notice to determine the tenancy at the expiration of a week from the subsequent Wednesday. (*t*)

Of the Application of the Notice to the Current Term of Hiring. — If the notice is made to apply to the current term of hiring, and it is given too near the end of the current term to be a good notice for that term, it will not apply to the next term of holding, as that is not the current term, and a fresh notice to quit, therefore, must be given. (*u*) The notice is always understood to apply to the year in which it is given, whether it expressly refers to the "current year" or not; and it will not operate as a notice to quit for the succeeding year, unless it appears plainly to have been the intention of the lessor that the notice, if invalid for the first year, should apply to the next year of holding. (*x*)

(*q*) *Doe v. Bayley*, 5 C. & P. 67; *Doe v. Raffan*, 6 Esp. 4; *Doe v. Hazell*, 1 Esp. 94; *Kemp v. Derrett*, 3 Campb. 511; *Huffell v. Armitstead*, 7 C. & P. 56.

(*r*) *Doe v. Butler*, 2 Esp. 539.

(*s*) *Doe v. Wrightman*, 4 Esp. 6.

(*t*) *Doe v. Scott*, 4 Moo. & P. 20.

(*u*) *Doe v. Morphet*, 7 Q. B. 577; 14 J. Q. B. 345.

(*x*) *Mills v. Goff*, 14 M. & W. 75.

Where a notice, dated the 27th, and served on the 28th, of September, required a tenant to quit "at Lady Day next, or at the end of your current year," and it appeared that the then current year of hiring ended on Michaelmas Day (the 29th of September), two days after the day of the date and one day after the service of the notice to quit, it was held that it could not be presumed that the notice was *intended to apply to the [* 271] year in which it was given, and of which two days only remained, but that it must be taken to apply to the next year. (y) So where the term of hiring commenced and ended on the 2d of February, and the lessor on the 22d of October, 1833, three months and ten days only before the expiration of the year, gave the tenant notice to quit "at the expiration of half a year from the delivery of this notice, or at such other time as your *present* year's holding shall expire after the expiration of half a year from the delivery of this notice," it was held that the notice, though bad for February, 1834, the succeeding February, was a good notice for February, 1835. (z)

The Commencement of the Current Year of the Tenancy¹ is generally regulated by the commencement of the original holding. Where premises were demised by an agreement dated the "13th of August, 1838," for the term of "one year and six months certain," at a yearly rent payable quarterly, "three calendar months' notice to be given on either side previous to the termination of the tenancy," and the tenant entered and held possession beyond the year and six months, and on the 7th of May, 1840, the lessor gave the tenant notice to quit on the 13th August next, the notice was held to be good, as the year of hiring was to be calculated from that day, and not from the termination of the year and six months. (a) And where a tenant entered into possession under an agreement for a lease for a term of five years and a half, and the lease was never granted, but the tenant continued to occupy, and when the five years and a half were nearly expired, negotiations were entered into for a further lease at an increased rent, to commence on the expiration of the

¹ See U. S. Dig. tit. *Landlord and Tenant*, sect. 927; ib. tit. *Time*.

(y) *Doe v. Culliford*, 4 D. & R. 248.

(a) *Doe v. Dobell*, 1 Q. B. 806; *Doe*

(z) *Doe v. Smith*, 5 Ad. & E. 353.

v. Samnel, 5 Esp. 173.

term of five years and a half, and this second lease was never executed, but the defendant continued in the occupation of the premises, paying the increased rent, it was held that the current year of the tenancy must be calculated from the original entry of the tenant upon the premises. (*b*) Where, on the other hand, a lessee of a term granted an underlease for fourteen years and a half from the 25th of December, and the term consequently expired on the 24th of June, and the underlessee continued in possession, paying rent, it was held that the subsequent tenancy commenced from the termination of the preceding underlease, and that a notice given on the 24th of December to quit on the 24th of June was a valid notice. (*c*)

[* 272] * **Calculation of the Current Year from one of the usual**

Feast-Days. — The term of hiring is generally, by the express or implied agreement of the parties, calculated from some one or other of the quarterly feasts; and if the tenant enters in the middle of a customary quarter, and afterwards pays his rent for that half-quarter, and continues then to pay from the commencement of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter-day. (*d*) But if he pays his rent at the end of the quarter or half-year from the time of his coming in, the tenancy will commence from the day of his entry. (*e*) If the notice be given to quit at Michaelmas generally, it is good for either Old or New Michaelmas. *Prima facie*, it would be for New Michaelmas; but if the holding was from Old Michaelmas, this notice would do for that also. (*f*) Where a notice was given on the 27th of September “to quit at the expiration of the term for which you hold,” evidence was permitted to be given of a general custom of the country to let from Lady Day, and of the fact of the rent being due at Michaelmas and Lady Day, and it was left to the jury to presume, in the absence of evidence to the contrary, that the tenancy, like other tenancies in that part of the country, was a tenancy from

(*b*) Berrey v. Lindley, 4 Sc. N. R. 61; 3 M. & Gr. 498; and see Kelly v. Patterson, L. R. 9 C. P. 681. (*d*) Doe v. Johnson, 6 Esp. 10; Doe v. Stapleton, 3 C. & P. 275.

(*c*) Doe v. Lines, 11 Q. B. 402; 17 L. J. Q. B. 108; Walker v. Gode, 6 H. & N. 594; 30 L. J. Ex. 173. (*e*) Doe v. Matthews, 11 C. B. 675. (*f*) Doe v. Perrin, 9 C. & P. 468; Doe v. Vince, 2 Campb. 256.

Lady Day to Lady Day. (*g*) It has been held that, since the existence of the new style sanctioned by act of parliament, a lease by deed of lands "to be holden from the feast of St. Michael" must be taken to mean New Michaelmas, and that extrinsic evidence is not admissible to show that it meant a holding from Old Michaelmas. (*h*) But although the oral expressions and agreements of the parties are inadmissible to alter or contradict the written contract, yet all the surrounding circumstances may be regarded; and if it can be shown that the rent has always been paid at Old Michaelmas, or that by the custom of the country lands are always let at Old Michaelmas, the holding would be deemed to be from the latter period. (*i*)

Admissions by the Tenant of the Commencement of the Term.

—The mere service upon the tenant of a notice to quit at a particular time is not *prima facie* evidence of the termination of the term at the time mentioned in such notice. (*k*) But if the tenant is expressly told that he must leave after the expiration of six months, or if a written notice is served personally on the lessee, and the latter reads it, and makes no objection to it, this is *prima facie* evidence to go to a jury that [* 273] the time of quitting is correctly stated in the notice. If he cannot read, or does not read, the notice in the presence of the person who serves it upon him, it must go for nothing. (*l*) An admission by the tenant of a holding corresponding with the time mentioned in the notice may be rebutted by direct evidence of a different holding. (*m*) If the period of the commencement of the term is uncertain, and the lessor applies to the lessee to ascertain the time of the commencement of his lease, the lessee is bound by the information he gives, and cannot be permitted afterward to set up a different holding for the purpose of defeating proceedings that have been taken by the landlord upon the faith of such statement. (*n*)

(*g*) *Doe v. Lamb*, Adam's Eject., 4th ed. 272.

(*h*) *Doe v. Lea*, 11 East, 312; *Smith v. Walton*, 1 M. & Sc. 382; 8 Bing. 235.

(*i*) *Furley v. Wood*, 1 Esp. 198; *Doe v. Benson*, 4 B. & Ald. 589; *Den v. Hopkinson*, 3 D. & R. 507.

(*k*) *Doe v. Calvert*, 2 Campb. 388.

(*l*) *Thomas v. Thomas*, 2 Campb. 647; *Doe v. Forster*, 13 East, 405; *Doe v. Wombwell*, 2 Campb. 559.

(*m*) *Oakapple v. Copous*, 4 T. R. 361; *Brown v. Burtinshaw*, 7 D. & R. 610.

(*n*) *Doe v. Lambly*, 2 Esp. 635.

Different Periods of Entry. — When the demised premises are entered upon at different periods, the notice to quit ought to refer to the time of tenant's entry upon and holding of the principal subject-matter of the demise. Thus if buildings and land are let together, to be entered upon at different times or holden from different periods, and the buildings constitute the principal subject-matter of demise, and the land is merely accessorial thereto, the notice to quit should refer to the tenant's entry upon and holding of the buildings, and not the land; and it is a question of fact which is the principal and which the accessorial subject of demise. (*o*) Though part of a farm is to be entered upon and quitted at different periods, *i.e.*, the pasture at Old Lady Day, the arable land at Old Candlemas, and the meadow at Old May Day, yet that is a letting from Lady Day to Lady Day; for it is no more than the custom of most counties would have directed without any special words for that purpose in any taking from Old Lady Day, *viz.*, that the arable land shall be entered upon at Candlemas to prepare it for the Lent corn, and the meadows not till May Day, when in the northern counties they are usually heyne'd for hay. (*p*)

Where a tenant entered into possession of a farm under an agreement "to enter on the tillage land at Candlemas, and on the house and all other the premises on Lady Day following, and to quit the farm according to the times of entry as aforesaid," and the rent was reserved at Michaelmas and Lady Day, it was held that a notice to quit, delivered half a year before Lady Day, but less than half a year before Candlemas, was good, the

taking being in substance from Lady Day, with a privilege for the incoming tenant to enter * on the arable land at Candlemas for the sake of ploughing, &c. (*q*)

And where the lessee of a dwelling-house, buildings, and bleaching manufactories, pasture and meadow land, entered into possession under an agreement for a lease, by which it was stipulated that the term of hiring should commence, as to the meadow ground from the 25th of December last, as to the pasture from the 25th of March next, and as to the houses, out-houses, and

(*o*) *Doe v. Howard*, 11 East, 498; (*p*) *Doe v. Snowdon*, 2 W. Bl. 1224.
Doe v. Hughes, 7 M. & W. 141; *Doe v. Rhodes*, 11 M. & W. 600. (*q*) *Doe v. Spence*, 6 East, 120.

other buildings, and all the rest of the premises, from the 1st of May, and the first half-year's rent was made payable on the day of Pentecost, and the other at Martinmas, it was held that, the substantial subject of demise being the house and buildings for the purpose of the manufacture, the time limited for taking possession thereof was the substantial time of entry, to which a notice to quit ought to refer, and not the 25th of December, the time limited for the taking possession of the meadow land, which was merely auxiliary to the principal subject of demise. (*r*)

Service of Notice to Quit. — If the notice to quit is served upon the actual occupiers of the demised premises, proof of such service is sufficient to sustain an action of ejectment. (*s*) Where the lessee puts another into possession or occupation of the demised premises, the party so let into possession is presumed to be the assignee of the lessee, and a notice to quit served upon such occupier will determine the term and sustain an ejectment against the lessee. Thus where the tenant went away leaving his son-in-law in possession, and the lessor gave the son-in-law notice to quit and brought ejectment, and the lessee came forward to defend the possession, saying that he had received no notice, and that his term was not determined, it was held that the notice was sufficient. (*t*) If the party in occupation of the house is the mere servant of the lessee, the notice should be a notice to the lessee to quit, and not a notice to the servant. (*u*) A delivery of the notice to the wife or servant of the lessee at the dwelling-house of the latter is a sufficient service. (*x*) But a servant to whom it is delivered should be expressly told that it is a notice to quit, and should be requested, either orally or by means of a written or printed address or direction, to deliver it to the tenant. (*y*) If there is a personal service of the notice upon the tenant himself, no written direction or address upon the notice is necessary; (*z*) and if the notice is directed to the tenant by a wrong Christian * name and he neglects to repudiate it or send it back, he is deemed to

(*r*) *Doe v. Watkins*, 7 East, 556.

(*s*) *Roe v. Street*, 2 Ad. & E. 331.

(*t*) *Doe v. Williams*, 6 B. & C. 41; 9

D. & R. 31.

(*u*) *Doe v. Woodman*, 8 East, 228.

(*x*) *Jones v. Marsh*, 4 T. R. 464; *Doe*

v. Dunbar, 1 M. & M. 11; *Alford v.*

Vickery, 1 Car. & M. 283; *Tanham v.*

Nicholson, L. R. 5 H. L. C. 561.

(*y*) *Doe v. Lucas*, 5 Esp. 152; *Smith*

v. Clark, 9 Dowl. 202.

(*z*) *Doe v. Wrightman*, 4 Esp. 5.

have waived the misdirection, and is bound by such notice. (*a*) If two or more persons hold possession of the demised premises as joint-tenants or tenants-in-common, notice to one of them is sufficient notice to all to determine the tenancy. (*b*)

Service of Notice through the Post-office. — If a notice to quit, properly addressed to the landlord or his authorized agent, has been put into the post-office, and is delivered within the usual business hours, on the 25th of March, that will be a good notice for the 29th of December following, although the landlord does not actually receive it until the 26th. (*c*)

Acceptance of Informal Notice — Proof of Notice. — If a tenant gives his landlord an insufficient notice to quit, and the landlord at first assents, but ultimately refuses to accept the notice, and the tenant quits according to his notice, the tenancy is not determined. (*d*) A written notice to quit may be proved by the production of a copy, although no notice has been given to produce the original. (*e*)

Waiver of Notice to Quit. — If the tenant remains in possession after the expiration of a good and valid notice to quit, his possession then becomes an adverse tenancy and possession, and the landlord may either bring an action of ejectment against him, or proceed in the county court or before justices of the peace for the recovery of the possession of the demised premises. But if he permits the tenant to remain in possession after the expiration of the notice, and demands and accepts rent in respect of the tenant's occupation of the property subsequently to the notice, this amounts to a waiver of the notice. (*f*) The same result follows if the lessor distrains for rent which he claims to be due in respect of the tenant's occupation subsequently to the expiration of the notice. (*g*) But if a banker or agent of the lessor, without any special authority from the latter, receives rent from the tenant, the act of such unauthorized agent does not amount to a waiver of the notice. (*h*) The money, more-

(*a*) *Doe v. Spiller*, 6 Esp. 70.

(*b*) *Doe v. Crick*, 5 Esp. 196.

(*c*) *Papillon v. Brunton*, 5 H. & N. 518; 29 L. J. Ex. 265.

(*d*) *Bessell v. Landesberg*, 7 Q. B. 638.

(*e*) *Doe v. Somerton*, 7 Q. B. 58.

(*f*) *Goodright v. Cordwent*, 6 T. R. 219; *Doe v. Batten*, Cowp. 243; *Blyth v. Dennett*, 13 C. B. 178; 22 L. J. C. P. 79.

(*g*) *Zouch v. Willingale*, 1 H. Bl. 311.

(*h*) *Doe v. Calvert*, 2 Campb. 387.

over, must be paid and accepted as rent, and not by way of satisfaction of the lessor's claim for double rent or double value, under the statutes for holding over. The giving of a second notice to quit before or after the expiration of the first notice does not necessarily amount to a waiver of the latter. (*i*) Nor does a collateral promise by the lessor not to act upon the * notice under certain circumstances, or in the case [* 276] of the happening of a certain event, amount to a waiver of the notice. (*k*) If a tenant retains possession and receives the produce and profits of the demised premises after the expiration of a notice to quit given by him, such retention of possession will in general, as against the tenant, amount to a waiver of the notice. (*l*) A waiver of a notice to quit, coupled with a continued occupation after the expiration of the notice, creates a new tenancy, taking effect at the expiration of the old one. (*m*)

Proof and Effect of Holding over.—There is no holding over by a tenant from the mere fact of his not sending the keys of a house to the landlord. It is enough if the tenant vacates the house and gives the landlord the means and opportunity of taking possession when he pleases; for possession is to be given on the land, and the landlord must come and take it. But if the tenant continues to use and occupy the premises after the term has ceased, he will be responsible for holding over. And the tenant is responsible if his sub-tenant holds over; for the landlord is entitled, upon the determination of the tenancy, to receive full and complete possession from the tenant. (*n*) But one joint-tenant is not responsible for a holding over by the other. (*o*) Mere holding over does not create a new tenancy, nor is it in itself any evidence of an agreement to renew the previous tenancy. (*p*) There must be a payment and acceptance of rent which accrued subsequently to the expiration of the lease; and then the tenant holds as tenant from year to year upon all such

(*i*) *Doe v. Humphreys*, 2 East, 237;
Doe v. Steel, 3 Campb. 116.

(*k*) *Whiteacre v. Symonds*, 10 East,
13.

(*l*) *Jones v. Shears*, 4 Ad. & E. 832.

(*m*) *Tayleur v. Wildin*, L. R. 3 Ex.
203; 37 L. J. Ex. 173; see *Holme v.*
Brunskill, 3 Q. B. D. 495.

(*n*) *Henderson v. Squire*, L. R. 4 Q.
B. 170; 38 L. J. Q. B. 73; *Caldecott v.*
Smythies, 7 C. & P. 808.

(*o*) *Tancred v. Christy*, 12 M. & W.
316.

(*p*) *Gray v. Bompas*, 11 C. B. N. s.
520; *Jenner v. Clegg*, 1 Mood. & Rob.
213.

of the terms of the original lease as are applicable to a yearly tenancy. (*q*) If, therefore, the lease contained a proviso for re-entry in case of non-payment of rent, the proviso is impliedly annexed to the yearly tenancy. (*r*) But if there is any evidence to show that the holding after the expiration of the lease was upon new and different terms, the legal presumption is rebutted, (*s*) and the nature of the holding becomes a question of fact. Whether any particular covenant is applicable to a yearly tenancy is in some cases a question of fact; (*t*) in other cases it will be a question of law. When a demise is determined [*277] by the expiration of the landlord's estate, and the tenant continues to hold under the remainder-man, paying the same rent, the question whether a term contained in the former tenancy is adopted into the new contract of demise, is a question of fact. If such a tenant continues to hold under the remainder-man, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation contained in the former tenancy, which is not known to him in fact, and is not according to the custom of the country. (*u*)

Double Yearly Value for Holding over.—Any tenant wilfully holding over and retaining possession of the demised premises after the determination of his term, and after possession has been demanded and notice in writing has been given him by the lessor, is liable to pay to the person kept out of possession double the yearly value of the lands, &c., detained. (*v*) An action for the recovery of this penalty may be brought by the landlord, and the landlord alone, either before or after he has recovered possession of the land by an action of ejectment. (*x*)

(*q*) *Torriano v. Young*, 6 C. & P. 11; *Thomas v. Packer*, 1 H. & N. 671; *Bishop v. Howard*, 3 D. & R. 298; *Buckworth v. Simpson*, 1 C. M. & R. 843; *Arden v. Sullivan*, 14 Q. B. 839; 19 L. J. Q. B. 271; *Beale v. Sanders*, 3 Bing. N. C. 850.

(*r*) *Williams, J., Doe v. Amey*, 12 Ad. & E. 480; *Hutton v. Warren*, 1 M. & W. 466.

(*s*) *Mayor of Thetford v. Tyler*, 8 Q. B. 95.

(*t*) *Hyatt v. Griffiths*, 17 Q. B. 505; *Oakley v. Monck*, L. R. 1 Ex. 195; 35 L. J. Ex. 87.

(*u*) *Oakley v. Monck*, L. R. 1 Ex. 159; 35 L. J. Ex. 87.

(*v*) 4 Geo. II. c. 28, sect. 1. As to the computation of the yearly value, see *Robinson v. Learoyd*, 7 M. & W. 48.

(*x*) *Soulsby v. Neving*, 9 East, 310; *Harcourt v. Wyman*, 3 Exch. 817; *Swinfen v. Bacon*, 6 H. & N. 846; 30 L. J. Ex. 37.

But it has been held that the act applies only to the case of a wilful and contumacious holding over by the tenant after a valid notice to quit, and not to a holding over under a *bona fide* claim of title or right, though erroneous. (*y*) If at the time of her marriage a woman is tenant of certain premises, and has received notice to quit, the husband after the marriage incurs the obligation of giving up possession of the premises, and may render himself liable to an action for double value for holding over; for if the wife incurs the penalty, the husband will have to pay it, and he cannot get rid of the obligation by pleading ignorance (for it is his duty to make inquiry), nor by showing that his wife deceived him, or concealed the notice to quit. (*z*) A weekly or quarterly tenant has been held not to come within the operation of the statute. (*a*) In the case of a tenancy from year to year, the ordinary notice to quit at the end of the current year of hiring is a sufficient demand of possession to entitle the lessor to double yearly value. (*b*) If the tenant holds under a lease for a term of years certain, a notice to quit at the expiration of such term is likewise a sufficient demand of possession, and such notice may be given previous to the expiration * of [*278] such term, or at any time afterward, so long as the tenant continues to hold as a tenant-at-will. (*c*) If the landlord has done any act amounting to a waiver of his notice to quit, he cannot make such notice the foundation of an action for double value. (*d*)

Double Rent for Holding over.—By the 11 Geo. II. c. 19, sect. 18, it is enacted that, if any tenant gives notice to the lessor of his intention to quit at a particular time, and does not deliver up possession of the premises at the time mentioned, such tenant, his executors, &c., shall from thenceforth pay to the landlord or lessor double the rent which he would otherwise have paid, to be levied, sued for, and recovered at the same times and in the same manner as the single rent. The tenant's notice to quit

(*y*) *Hirst v. Horn*, 6 M. & W. 395; *Page v. More*, 15 Q. B. 684; *Swinfen v. Bacon*, *supra*.

(*z*) *Lake v. Smith*, 1 B. & P. N. R. 179.

(*a*) *Lloyd v. Rosbee*, 2 Campb. 454; *Sullivan v. Bishop*, 2 C. & P. 359.

(*b*) *Wilkinson v. Colley*, 5 Burr. 2698; *Poole v. Warren*, 8 Ad. & E. 582; *Lake v. Smith*, 4 B. & P. 179.

(*c*) *Cutting v. Derby*, 2 W. Bl. 1075; *Messenger v. Armstrong*, 1 T. R. 53.

(*d*) *Ryal v. Rich*, 10 East, 47.

need not be in writing, in order to support the lessor's claim to double rent, nor need the lease which the tenant has determined by his notice to quit be a lease in writing. (e) But the notice must be a good notice to quit at some fixed time, and at a period when the tenant is able by notice to put an end to the tenancy. If the tenant merely gives notice that he will quit "as soon as he can possibly get another location," (f) or gives notice to quit in the middle instead of at the termination of the current term of hiring, or a notice of too short a duration, and which does not therefore bind the lessor, the lease is not determined, and there cannot, consequently, be any holding over by the tenant. (g) A tenant who holds over for one year after notice to quit, paying double rent, may quit at the end of such year without fresh notice. (h)

Determination of Tenancies by Railway Notices.—If lands holden by tenants from year to year are required by railway companies for the making of a railway, the company may in general, under the powers of their act, either give the ordinary landlord's notice to quit, ending with the current year of the tenancy, in which case no compensation would be payable in respect of any unexpired term, or six months' notice, to be given at any time, in which case the tenant will be entitled to compensation for the value of the term between the expiration of the six months' notice and the time when a regular landlord's notice would have expired. If, after having given a notice not ending with the expiration of the current year, the company inform the tenant that he may hold on till the end of the current year, and he does so, the situation of the parties is [*279] the same as if * a regular landlord's notice had been originally given. (i) If the tenant continues in possession after the expiration of the notice, he holds simply as a tenant at sufferance, without any estate or interest at all in the premises, unless rent is received from him or the premises are re-demised to him. (k)

(e) *Timmins v. Rowlinson*, 3 Burr. 1608.

(f) *Farrance v. Elkington*, 2 Campb. 592.

(g) *Johnstone v. Huddlestons*, 4 B. & C. 922.

(h) *Booth v. Macfarlane*, 1 B. & Ad. 904.

(i) *Reg. v. Lond. & Southamp. Ry. Co.*, 10 Ad. & E. 3.

(k) *Ex parte Nadin*, 17 L. J. Ch. 421.

Recovery of Possession. — Possession of land cannot be gained by an act of trespass which has never been acquiesced in by the landowner. Every person who trespasses upon another man's land and remains there tortiously may be expelled by main force. (*l*) But if he has once gained a lawful possession which is determined, and he then continues unlawfully to hold the land, the landowner is punishable for a forcible entry if he enters with a strong hand to dispossess him. (*m*) The tenant cannot maintain an action for damages against the landlord for a trespass upon the realty in respect of the forcible entry; for there is no trespass by the latter in entering on property which is his own, and on which he has a legal right to enter. Therefore if the tenant of a dwelling-house holds over wrongfully, and the landlord enters and pulls down the house, or stops up the chimney, or takes off the roof, and the tenant brings an action against the landlord for trespassing on the land, it is an answer that the house was the defendant's house, and therefore that he entered and pulled it down, &c. (*n*) It has been laid down by Parke, B., that "where a breach of the peace is committed by a freeholder who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party," and that "it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, though in so doing a breach of the peace was committed." (*o*) Tindal, C. J., is reported to have said that "if the landlord in making his entry upon the tenant has been guilty either of a breach of a positive statute or of an offence against the common law, such violation of the law in making the entry causes the possession thereby obtained to be illegal." (*p*) But this has since been decided not to be law; and it is now well established that at the determina-

(*l*) *Browne v. Dawson*, 12 Ad. & E. 629.

(*m*) *Rex v. Bathurst*, Say, 227; *Rex v. Wilson*, 8 T. R. 361.

(*n*) *Burling v. Reed*, 11 Q. B. 904; *Davison v. Wilson*, 17 L. J. Q. B. 196.

(*o*) *Harvey v. Bridges*, 14 M. & W. 442.

(*p*) *Newton v. Harland*, 1 Sc. N. R. 490.

tion of the term the landlord may enter and take possession of the demised premises, and, after civilly [*280] *requesting the tenant to depart, may, in case of his refusal, gently lay hands upon him and turn him out, subject only to the liability to be indicted for a forcible entry. (*q*) If the landlord has no right to enter, and he takes advantage of the temporary absence of the tenant to fasten up the door of his apartments and exclude him from re-entering, the tenant may recover damages against the landlord for breaking and entering, although the landlord has never actually entered the rooms. (*r*)

License to eject.—Where it was provided that, in case of non-payment of rent or non-performance of covenants, it should be lawful for the lessor and his agents immediately to enter upon and take possession of the demised premises, and to expel the lessee and all persons claiming under him, without any legal process, as effectually as any sheriff might do in case the lessor had obtained judgment in ejectment for the recovery of possession, and a writ had issued thereon to the sheriff in due form of law, and that the leave and license of the lessee might be pleaded in any action brought by the latter for such entry and ouster, and the agreement be used as conclusive evidence of such leave and license, it was held that the lessor had a right, as between himself and the lessee, under this agreement, to eject the lessee by main force, and might plead such license in bar of an action of trespass brought by the latter. (*s*)

Ejectment under Provisos for Re-entry.—When the lessor has a right to re-enter in case of non-payment of rent, and brings an action of ejectment, he must show that demand was made of the rent upon the demised premises, unless there is no one there on whom demand can be made and the demand has been made on the party liable to pay, (*t*) and that the same or some part thereof has not been paid, (*u*) unless the proviso is for

(*q*) *Davis v. Burrell*, 10 C. B. 822;
Harvey v. Bridges, 14 M. & W. 437; 1
 Exch. 261; *Jones v. Chapman*, 2 Exch.
 803, 821; *Pollen v. Brewer*, 7 C. B. N. S.
 371.

(*r*) *Lane v. Dixon*, 3 C. B. 776.

(*s*) *Kavanagh v. Gudge*, 7 Sc. N. R.
 1025; 7 M. & Gr. 316.

(*t*) *Manser v. Dix*, 8 De G. M. & G.
 703.

(*u*) Bro. Abr. *Demande*, 19; *Kid-
 welly v. Brand*, Plowd. 70 a, b.

re-entry without any demand of the rent. (x) The demand must be of the precise sum due, and must be made on the day when the rent was due and payable by the terms of the lease, and at a convenient time (which ought to be an hour) before sunset. (y) Where the proviso is for re-entry in case of non-payment of rent for the space of ten, fifteen, or any other number of days after it has become due, the demand must be made on the tenth or last day. (z) Where rent was payable quarterly, and two quarters were in arrear and * were [* 281] demanded together, it was held that the lessor could not avail himself of the proviso for re-entry in case of non-payment for twenty-one days, as the first quarter ought to have been demanded on the twenty-first day after it had become due. (a)

Where there is no Sufficient Distress, and one-half year's rent is due and in arrear, and the lessor has a right to re-enter for non-payment thereof, proceedings may be taken under the 15 & 16 Vict. c. 76, sect. 210. (b) The operation of the statute appears to be confined to cases where the tenant was six months in arrear at the very time when the landlord had recourse to the statutory remedy. If the landlord distrains for the rent due, he waives any breach of the condition of re-entry which had accrued prior to the taking of the distress. (c) Proof of no sufficient distress at the time the right to re-enter accrued is *prima facie* proof of there being no sufficient distress at the time of the service of process. (d) If more than half a year's rent is in arrear, the case is within the statute. (e); but if more than half-a-year's rent is due, and there is sufficient distress on the premises to satisfy one half-year, the landlord cannot proceed under the statute, but must make his demand and entry at common law. (f) But the distress must be available; and, therefore, if the tenant locks up the premises, so that the land-

(x) Doe v. Masters, 2 B. & C. 490.

(y) Fabian's case, Cro. Eliz. 209; Co. Litt. 202a; 1 Saund. 287, n. 16; Doe v. Brydges, 2 D. & R. 29; Acocks v. Phillips, 5 H. & N. 183.

(z) Hill v. Grange, Plowd. 172a, 173; Clun's case, 10 Co. 129a; Wood and Chiver, 4 Leon. 180; Doe v. Wandlass, 7 T. R. 117.

(a) Doe v. Paul, 3 C. & P. 613. As

to recovery of possession by landlord from a company being wound up, see General Share Co. v. Wetly Brick Co., 20 Ch. D. 260.

(b) Doe v. Franks, 2 C. & K. 678.

(c) Cotesworth v. Spokes, 30 L. J. C. P. 222.

(d) Doe v. Fuchau, 15 East, 286.

(e) Doe v. Alexander, 2 M. & S. 525.

(f) Doe v. Roe, 9 Dowl. 548.

lord cannot get at the goods which may happen to be upon them, he may proceed under the statute. (*g*) The right of re-entry must be absolute and unqualified. If he has a right only to re-enter and hold until arrears of rent are satisfied, and not to avoid the lease altogether, he cannot avail himself of the statute. (*h*) The tenant or his assignee or sub-lessee (*i*) may, at any time before trial (sect. 212), stay all further proceedings by paying or tendering to the lessor, or bringing into court, the rent and arrears with costs. (*k*)

Recovery of Possession where the Demised Premises are deserted. — The 11 Geo. II. c. 19, sect. 16, and the 57 Geo. III. c. 52, give a summary remedy by proceedings before justices for recovery of demised premises, when the tenant has deserted them, and left them uncultivated or unoccupied, so that no sufficient distress can be had. And by the 3 & 4 Vict. c. 84, police magistrates and police constables within the metropolitan police district are enabled to put the lessor into possession and determine the lease. But this power is not by any [*282] of the provisions of the last-named *statute, or by the 11 & 12 Vict. c. 43, sect. 34, vested in the Lord Mayor or alderman sitting in the justice room at the Mansion House or Guildhall. (*l*) The record of the proceedings need not show that any complaint or inquiry was made before the justices upon oath, nor state that the landlord had a right of re-entry. (*m*) Where a bankrupt lessee of a dwelling-house went away, leaving a person in the house whose possession was merely colorable, it was held that the justices were warranted in finding that the lessee had deserted the premises. (*n*) But where the tenant left his wife and children in the house, but took away his furniture and went away himself, it was held that there was no desertion; and the judges of assize, on appeal, ordered restitution of the demised premises with costs. (*o*) Where the justices go the first time and find the premises deserted, then, unless some one appears and pays the rent, when they go the second

(*g*) *Doe v. Dyson*, M. & M. 77.

(*h*) *Doe v. Bowditch*, 8 Q. B. 973.

(*i*) *Doe v. Byron*, 1 C. B. 623.

(*k*) *Roe v. Davis*, 7 East, 363.

(*l*) *Edwards v. Hodges*, 15 C. B. 477.

(*m*) *Basten v. Carew*, 5 D. & R. 558.

(*n*) *Ex parte Pilton*, 1 B. & Ald. 369.

(*o*) *Ashcroft v. Bourne*, 3 B. & Ad. 684.

time they are to deliver possession to the lessor. The proceedings of the justices are examinable in a summary way by the judges (sect. 17).

Recovery of Possession of Houses and Small Tenements.—

The statute 1 & 2 Vict. c. 74, enables justices of the peace to give possession to the landlord of houses and land held for a term not exceeding seven years, rent free or at a rent not exceeding £20 per annum, upon which no fine is payable, provided the tenancy has been duly determined and notice has been given as therein provided. (*p*) If under this statute a tenancy is proved before the justices, and a determination of that tenancy, and a refusal on the part of the tenant to quit, it is not competent to the tenant to set up the title of any third party, or raise any question of title before the magistrate. (*q*) If the term or interest of the tenant in any house, land, or corporeal hereditament, where the value of the premises or the rent does not exceed £50 by the year, (*r*) and on which no fine has been paid, has been duly determined, and the tenant or (if he does not occupy or only occupies part) any person by whom the premises or part of them are then actually occupied, neglects or refuses to deliver up possession, the landlord or his agent may, by proper proceedings in the county court, obtain a warrant of possession. (*s*) The plaint must be brought in the district where the tenements are situate; and the court will have jurisdiction, even though a *bona fide* question of title is raised, * where [*283] neither the annual value of the lands nor the rent payable in respect thereof exceed £20. (*t*) If, however, the annual value or rent exceed that sum, the jurisdiction of the court will be ousted if a *bona fide* question of title is raised; and even if neither rent nor value exceed £20, yet the defendant may have the action tried in a superior court if he can satisfy a judge that the title to lands of greater annual value than £20 will be affected by the decision. (*u*) A tenant is in general estopped from disputing his landlord's title; but he may show that it has

(*p*) *Delaney v. Fox*, 1 C. B. N. s. 166. nual value. *Harrington, Earl of, v. Ramsey*, 8 Exch. 881; 2 E. & B. 669; 22 L.

(*q*) *Rees v. Davies*, 4 C. B. N. s. 62. J. Q. B. 460.

(*r*) If the rent does not exceed £50, the County Court has jurisdiction, though the premises are of greater an- (*s*) 19 & 20 Vict. c. 108, sect. 50.
(*t*) 30 & 31 Vict. c. 142, sect. 12.
(*u*) 30 & 31 Vict. c. 142, sect. 13.

expired; and if there is some evidence to support the defence, and it is not a mere illusory claim, and the rent or annual value of the premises exceed £20, the judge of the county court should refrain from trying the question. (x)

Where on the hearing of a plaint it appeared that one of the matters seriously in dispute was whether the whole or part of a house had been demised, it was held that the inquiry involved a question of title, and that the county court had no jurisdiction in the matter. (y) A decision of a county court judge, that the title is not in question, is by no means conclusive of the fact. The question may be brought before the superior courts on motion for a prohibition by affidavit; and if the court directs that the party should declare, the question becomes one of evidence. (z) Neither the tenant nor any one claiming through him, nor any one put into possession by him, can, during the demise, controvert the landlord's title in an action of ejectment; but he may show that the title has expired. (a) If a tenancy is sought to be established through the medium of payment of rent to the plaintiff or to his agent, it must be shown that the rent was either paid by the defendant himself, or by some person through whom he claims, or by his authorized agent; for an unauthorized payment of rent by a stranger will not be binding on the defendant, or in any way affect his rights. Where a party distrained for rent, and the lessee paid the rent due under the distress without protest or objection, it was held that he could not after that controvert the title of the plaintiff. (b)

Rights of Outgoing and Incoming Tenants — Away-going Crops, Allowances for Tillage, Manures, &c. — The rights of tenants to way-going crops, tillages, and value of improvements, &c., have been defined and extended in some measure by the [* 284] Agricultural Holdings Act, 1875, but the act is only permissive, (c) and neither landlords nor tenants appear

(x) *Mountnoy v. Collier*, 1 E. & B. 630; 22 L. J. Q. B. 126; *Marsh v. Dewes*, 17 Jur. 558; *Kerkin v. Kerkin*, 3 E. & B. 399; *Latham v. Spedding*, 17 Q. B. 440.

(y) *Chew v. Holroyd*, 8 Exch. 249; 22 L. J. Ex. 95.

(z) *Thompson v. Ingham*, 14 Q. B. 710.

(a) *Ante*, p. * 213; *Doe v. Smythe*, 4 M. & S. 347; *Doe v. Mills*, 3 Ad. & E. 20; *Doe v. Baytap*, 3 ib. 190.

(b) *Doe v. Mitchell*, 3 Moore, 229; *Hitchens v. Thompson*, 5 Exch. 50.

(c) Sects. 54, 55, 56, 57; also the act only applies to holdings which are agricultural or pastoral, and which are not less than two acres; sect. 58.

to have been eager to avail themselves of its provisions. Compensation is to be given to tenants for improvements of different sorts, (*d*) according to the length of time since they were made, (*e*) and according to a certain scale, (*f*) after proper notices, (*g*) and subject to certain restrictions and deductions. (*h*) The landlord paying compensation may obtain a charge upon the holding. (*i*) All tenants who held by an uncertain tenure, and whose interest might at any time be determined by the will of the lord, were by the common law entitled to emblements and the crops and annual produce of the soil which had been sown or planted by them, and which had not come to maturity at the period of the determination of their interest. (*k*) In all farming leases, the custom of the country with respect to the mode of cultivation and the right to the away-going crop is impliedly annexed to the terms of the lease, unless it is excluded by express provisions and stipulations. (*l*) The general rule in the case of farm leases is that the tenant is bound to leave the land when he quits in the same state as he found it on taking possession. If he has taken the farm under a custom by which the out-going tenant is bound to leave a certain quantity of clover and grass seeds or fallows, or a certain number of acres of growing wheat, or turnips, or other produce, or a certain quantity of hay and straw, or manure, on the demised premises, he must in his turn, when he quits the land, leave it in the same state and condition, and with the same privileges and advantages for the benefit of his successor, that he himself enjoyed when he entered upon it.

By the custom of some counties, the outgoing tenant takes two-thirds of particular crops, leaving one-third to the incoming tenant. (*m*) In some districts, all the hay and straw must be left to be consumed on the farm; whilst in others, the tenant is entitled to take it away with him. Sometimes the landlord or the incoming tenant has a right, and in some instances he is bound by custom, to take the away-going crops, and also the

(*d*) Sect. 5.(*e*) Sect. 6.(*f*) Sects. 7, 8, 9.(*g*) Sects. 10, 12.19. (*h*) Sects. 11, 13, 14, 15, 16, 17, 18,(*i*) Sects. 42-44.(*k*) Litt. sects. 68, 69.(*l*) *Wigglesworth v. Dallison*, 1 Doug. 201; 1 Smith's L. C. 5th ed. 520.(*m*) *Holding v. Pigott*, 5 Moo. & P. 427; *Griffiths v. Tombs*, 7 C. & P. 810; as to the customs in different counties, see *Wood, L. & T.* 11th ed. p. 721.

straw and hay, and sometimes the manure, from the outgoing tenant at a valuation; and when such a custom exists, the tenant has a right, after the expiration of his lease, and after he has quitted the premises, to enter upon the land as occasion [*285] may require, to *improve and tend the crop. If the landlord or the incoming tenant does not take the crop at a valuation, the tenant has impliedly accorded to him, by general custom and usage, all such rights and privileges as are necessary to enable him to gather it in and secure it, and sell or turn it to profit and advantage when arrived at maturity, such as free ingress and egress into and from the demised premises, the temporary use of the barns to thrash it out, and yard-room for the straw; and he has a right, moreover, to the possession of the field for a reasonable time for the carrying away as well as the cutting of his corn. (*n*) If no custom exists giving the tenant a right to the away-going crop, the landlord is, as we have before seen, entitled thereto. The tenant, therefore, must in all cases make out and establish the custom. (*o*) When no such custom exists, the natural consequence is that the tenant does not till or sow the ground at the close of his term of hiring; and a custom therefore appears to prevail, in all places where the outgoing tenant is not entitled to the away-going crop, for the incoming tenant or the landlord to enter to manure and till the land, and plant the spring corn, and prepare for the harvest, prior to the termination of the lease and the commencement of his own term and interest. (*p*)

Whatever custom regulates the tenant's rights on entering, the same custom regulates his rights on leaving; and the custom may be given in evidence, although there is a lease under seal, or a written contract of demise between the parties. All customary allowances also, as between outgoing tenant and the landlord or the incoming tenant, are impliedly annexed to the express terms of the lease, such as allowances for expenses

(*n*) *Boraston v. Green*, 16 East, 81; *sion*, see *Hayling v. Okey*, 8 Exch. 545.
Beaty v. Gibbons, ib. 118; *Strickland v. Maxwell*, 2 Cr. & M. 539; *Griffiths v. Puleston*, 13 M. & W. 358; as to the right of the grantee of growing crops after the landlord has resumed possession, see *Hayling v. Okey*, 8 Exch. 545.
 (*o*) *Caldecott v. Smythies*, 7 C. & P. 808.
 (*p*) *Kennedy & Granger*, on Tenancy Customs.

incurred in draining lands that required draining according to good husbandry, though the drainage was done without the landlord's knowledge or consent; (*q*) also for manuring, tilling, fallowing, half-fallowing, and sowing the land, for seeds and labor, foldage and manure. (*r*) The tenant's rights to growing crops and produce are in all cases strictly confined to annual crops, or the first year's produce of seeds and roots sown or planted by him during the last year of his tenancy, and do not extend to trees, shrubs, and plants of a perennial character (excepting the fruit-trees, plants, and shrubs of seedsmen and nursery-gardeners, an exception introduced for the * benefit of [* 286] trade). (*s*) Thus a border of box, planted by a tenant in a garden demised to him, cannot be taken up and removed at the expiration of his term (*t*), nor a strawberry-bed (*u*), nor hedges, nor fruit-trees. (*v*)

The person primarily liable to the outgoing tenant is the landlord, (*x*) who, on the other hand, is entitled to be allowed the amount of rent due to him. But it constantly happens that the incoming tenant, who in the end, by his bargain with the landlord, is to take and pay for the tillages, in order to avoid circuitry and the trouble and expense of two valuations, agrees with the outgoing tenant that the valuation shall be made directly from the latter to him. That, however, does not rest upon the custom, but is a mere conventional arrangement, without which there would be no privity between the outgoing and the incoming tenant. There is, generally speaking, no formal agreement, but each appoints a valuer, and the valuers settle the amount to be paid; and in that case there is an implied contract that if rent is due from the outgoing tenant to the landlord, and such rent is paid by the incoming tenant, it may be set off against the value of the tillages. (*z*)

Where the lease determines by the death or cesser of the

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| (<i>q</i>) <i>Mousley v. Ludlam</i> , 21 L. J. Q. B. 64. | (<i>t</i>) <i>Empson v. Soden</i> , 4 B. & Ad. 655. |
| (<i>r</i>) <i>Dalby v. Hirst</i> , 3 Moore, 536; 227. | (<i>u</i>) <i>Watherell v. Howells</i> , 1 Campb. |
| <i>Hutton v. Warren</i> , 1 M. & W. 477; | (<i>v</i>) <i>Wyndham v. Way</i> , 4 Taunt. 316. |
| <i>Wilkins v. Wood</i> , 12 Jur. Q. B. 583; | (<i>x</i>) <i>Bradbury v. Foley</i> , 3 C. P. D. 129. |
| <i>Faviell v. Gaskoin</i> , 7 Exch. 273. | (<i>z</i>) <i>Stafford v. Gardner</i> , L. R. 7 C. P. 508. |
| (<i>s</i>) <i>Wardell v. Usher</i> , 3 Sc. N. R. 508. | |

estate of any landlord entitled for his life, or for any other uncertain interest, the tenant, instead of claims to emblements, may continue to hold the farm or lands until the expiration of the then current year of his tenancy; (a) and the succeeding landlord is entitled to receive of the tenant the proper proportion of the rent for the period which may have elapsed from the lessor's death or cesser of the estate of such lessor to the time of the tenant's quitting, and may distrain for such proportion. (aa)

Sale of Straw off the Land. — If by the terms of the lease the hay and straw are to be consumed by the tenant on the land, and the lessee sells the crop, and the purchaser removes it, the landlord may maintain an action against the purchaser for the value of the hay or straw, &c., so removed. (b) It is no answer to such an action to show that the tenant has brought back an equivalent in the shape of manure. (c) If the value of straw sold off is to be returned in manure, the manure value and not the market price of the straw sold would seem to be [*287] the proper criterion of *expenditure upon the land. (d)

According to the custom of the country in some districts, the incoming tenant, in the absence of a special agreement, pays the outgoing tenant a consuming price, or two thirds the market price for the straw; but if the outgoing tenant is bound to consume all the manure on the farm, the allowance in respect of straw, as between him and the incoming tenant, would be only half the market price, called a fodder price. And where there is no special agreement to the contrary, the tenant is often by custom entitled to go out as he came in. (e) An outgoing tenant, therefore, who on coming in has paid for straw in accordance with the custom, is entitled to be paid for straw on going out; and a stipulation in a lease binding the tenant "to consume with stock on the farm all the hay, straw, and clover grown

(a) 14 & 15 Vict. c. 25, sect. 1. If there are from the nature of the case no claims to emblements, the section will not apply; *Haines v. Welch*, *infra*. see St. L. R. Act, 1873, see *Wilmot v. Rose*, 3 E. & B. 563. See *Hawkins v. Walrond*, 1 C. P. D. 280.

(aa) *Haines v. Welch*, L. R. 4 C. P. 30 L. J. Ex. 25.

91; 38 L. J. C. P. 118. (d) *Lowndes v. Fountain*, 11 Exch. 491.

(b) 56 Geo. III. c. 50, sect. 11; repealed as to assignee of insolvent debtor; (e) *Clarke v. Westrope*, 18 C. B. 774.

thereon, which manure shall be used on the said farm," is in no-wise inconsistent with the tenant's customary right to receive payment for the unconsumed straw on his going out. (*f*)

Removal of Superstructures and Fixtures.—Buildings and constructions of a permanent character, erected upon the demised premises by the tenant and attached to the freehold, are irremovable by him at common law, unless they have been erected for trading purposes; but by the 14 & 15 Vict. c. 25, sect. 3, provision is made for the removal of farm-buildings, and buildings, engines, or machinery erected by the tenant with the consent in writing of the landlord, either for agricultural purposes or for the purposes of trade and agriculture. And by the Agricultural Holdings Act, 1875, (*g*) engines, machinery, and fixtures affixed by the tenant, after notice and without objection, for which he is not entitled to compensation, and not affixed in pursuance of some obligation or instead of some fixture belonging to the landlord, are the property of the tenant and removable by him, after performing all obligations and giving a month's notice to the landlord, and not doing any avoidable damage, and making good what is done. The landlord may elect to purchase any fixture at a fair value to the incoming tenant. Trade and tenant's fixtures are things which are annexed to the land for the purpose of trade or of domestic convenience or ornament, in so permanent a manner as to become part of the land, and yet the tenant who has erected them is entitled to remove them during his term, or it may be within a reasonable time after its expiration. (*h*)

* **Abandonment of the Right of Removal.**—A covenant [* 288] in a lease to yield up the demised premises, together with all fixtures thereunto belonging, is confined to fixtures which belonged to the demised premises at the time of the execution of the lease; but a covenant to yield up fixtures that may belong to the demised premises extends to fixtures that are afterward put up by the tenant. (*i*) Whenever the tenant has a right of removal, he

(*f*) *Muncey v. Dennis*, 1 H. & N. 220.

(*g*) 38 & 39 Vict. c. 92, sect. 53; but see as to this act the provisions stated, *ante*, p. * 283.

(*h*) *Climie v. Wood*, L. R. Ex. 328; 38 L. J. Ex. 223.

(*i*) *Hitchman v. Walton*, 4 M. & W. 414; *Naylor v. Collinge*, 1 Taunt. 19; *Thresher v. E. L. Water Co.*, 2 B. & C. 608; 4 D. & R. 62; *Martyr v. Bradley*, 2 M. & C. 25; 9 Bing. 24; *West v. Blakeway*, 3 Sc. N. R. 218.

must exercise such right prior to the determination of his tenancy; he cannot, after he has once quitted the demised premises, re-enter for the purpose of severing and removing fixtures. (*k*) If the tenant holds over wrongfully, he loses his right to sever and remove fixtures; (*l*) but if a lease becomes forfeited, the tenant may, before the landlord re-enters, or before the forfeiture is established by the judgment of a court of law, remove his fixtures, and cannot, it seems, be made responsible for so doing, (*m*) but not afterward. (*n*) If the landlord gives the lessee permission to leave the fixtures on the premises, and make the best terms he can for them with the incoming tenant, and the latter enters and takes possession of the fixtures, but refuses to pay for them, the lessee cannot enter to remove them, nor can he recover the value of them. (*o*) When it is provided by the terms of a lease that the lessee, at the expiration or other sooner determination of the term, is to have certain fixtures, and the lease becomes forfeited, the lessee has a reasonable time from the date of the forfeiture for the removal of his fixtures. (*p*)

Right of a Purchaser or Mortgagee to enter and remove Fixtures after a Surrender of the Term. — If a lessee possessed of tenant's fixtures removable at the expiration of his term, assigns them to a purchaser, and afterward surrenders his lease, the purchaser has a right to enter and sever the fixtures, notwithstanding that the lessee himself would have forfeited his right to remove them; for an estate surrendered hath, in consideration of law, a continuance, having regard to strangers who were not parties or privies to the surrender, "lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender." (*q*) Where, therefore, a lessee mortgaged [* 289] his 'severable tenants' and trade fixtures, and then surrendered his lease to the lessor, who granted a fresh

(*k*) *Lee v. Risdon*, 7 Taunt. 191; *Quincy, ex parte*, 1 Atk. 477; *Dudley v. Warde*, Amb. 113; *Lyde v. Russell*, 1 B. & Ad. 394.

(*l*) *Leader v. Homewood*, 27 L. J. C. P. 316.

(*m*) *Stansfeld v. Mayor of Portsmouth*, 4 C. B. N. s. 131; 27 L. J. C. P. 124; *Storer v. Hunter*, 3 B. & C. 368.

(*n*) *Heap v. Barton*, 12 C. B. 274; *Pugh v. Arton*, L. R. 8 Eq. 626; 38 L. J. Ch. 619.

(*o*) *Roffey v. Henderson*, 17 Q. B. 574; 21 L. J. Q. B. 49.

(*p*) *Stansfeld v. Mayor, &c. of Portsmouth*, 4 C. B. N. s. 133; 27 L. J. C. P. 124.

(*q*) *Co. Litt.* 338 b.

term to the defendant, it was held that the mortgagees had a right to enter and sever the fixtures, and that they might maintain an action against the lessor for preventing them from exercising their right to sever, and in such action were entitled to recover the value of the fixtures as severed. (*r*)

Non-payment of Tithe Rent-charge by an Out-going Tenant. —

If any occupying tenant quits leaving unpaid any tithe rent-charge (14 & 15 Vict. c. 25, s. 4), and the tithe owner gives notice of proceeding by distress for its recovery, the landlord or succeeding tenant may pay the tithe rent and any expenses incident thereto, and may recover the amount from the outgoing tenant or his legal representatives, in the same manner as if the same were a debt by simple contract due to the landlord or tenant making such payment.

Inclosures of Waste Land by Tenants. — If the tenant during the demise has inclosed land from the adjoining waste, and used it in common with the demised premises, the title of the lessor will, as between him and the lessee, prevail over the whole, whether the tenant made the inclosure with or without the assent of the lessor; (*s*) and, in either case, the statute of limitations will not begin to run against the lessor until the termination of the lease. (*t*)

A Short Form of Lease has been provided by the 8 & 9 Vict. c. 124.

Leases obtained by Misrepresentation. — An estate or interest in land once vested cannot afterwards be divested in a court of law, on the ground that the deed creating the estate has been obtained by a fraudulent misrepresentation respecting some matter collateral to the contract. Where, therefore, a lessor has been induced to execute a lease by reason of a fraudulent representation on the part of the lessee as to the use to which he intended to apply the premises, it was held that the lease was not thereby avoided and the term gone, but the lessor must seek his remedy by injunction; (*u*) but where the lease is granted for the express

(*r*) The London Loan & Discount Co. v. Drake, 6 C. B. N. S. 798; 28 L. J. C. P. 297. 409; Kingsmill v. Millard, 11 Exch. 319.

(*t*) Whitmore v. Humphries, L. R. 7

(*s*) Andrews v. Hailes, 22 L. J. Q. B. C. P. 1; 41 L. J. C. P. 43.

(*u*) Feret v. Hill, 15 C. B. 226.

purpose of carrying into effect an illegal act, the courts will not lend their aid for the enforcement of any of the provisions of the illegal contract. (x)

The Cancellation of a Lease by mutual consent of the [* 290] parties * discharges the covenants and promises therein contained, but does not divest the estate created by the lease, or destroy the lessor's right of action for the rent founded on the privity of estate. Arrears of rent, therefore, which accrue due prior to the cancellation of a lease, may be recovered by the landlord in an action founded on the privity of estate. (y)

Assignment. — The doctrine of covenants running with the land is confined to covenants annexed to the land by the indenture of demise; and the assignment of a parol tenancy does not pass to the assignee a right of action upon a special stipulation between the original landlord and the lessee. (z) If, however, the landlord has consented to the substitution of the assignee in the place of the original tenant, that will create a new contract between the landlord and the assignee upon which either may sue. (a) The equitable assignee of a legal term is not liable to the lessor for rent, or for damages in respect of breaches of covenants, even though he may have been in possession. (b)

Breach of Contract to grant a Lease. — The rule which governs sales of real property, that if the vendor fails to make a good title the purchaser is only entitled to recover the amount of his deposit and the expenses to which he has been put, does not apply to the case of a lease granted by a lessor in excess of his leasing powers, and containing a covenant for quiet enjoyment; and if the lease is repudiated by a person having a good title so to do, the lessee is entitled to recover the full value of the lease; and it makes no difference that the lease was a reversionary lease, and that it was repudiated before the lessee had entered into possession under it. In such a case it was held

(x) *Ritchie v. Smith*, 6 C. B. 462; (z) *Elliott v. Johnson*, L. R. 2 Q. B. 120.
Gas Light Co. v. Turner, 7 Sc. 779; 8 ib. 609.

(y) *Ward v. Lumley*, 5 H. & N. 94; (a) *Buckworth v. Simpson*, 1 C. M. & R. 834.

29 L. J. Ex. 322; *Bolton v. Bishop of Carlisle*, 2 H. Bl. 264; 4 B. & A. 677. (b) *Cox v. Bishop*, 8 De G. M. & G. 815. See *Haywood v. Bruns. Build. Soc.* 8 Q. B. 403.

that the lessee was entitled to recover the value of the lease and the expense of the lease so repudiated, but not the expense of a lease of the demised premises which he took from the person really entitled to grant one after the repudiation of the first lease, nor to a £10 per cent compensation given by the jury on a supposed analogy to the case of a compulsory sale to a railway company under an act of parliament. (c) If a man contracts to grant a good and valid lease, without having any color of title to the premises intended to be demised, the intended lessee is to be placed, as far as money can do it, in the same position as he would have been in if the contract had been fulfilled, and may recover all the damages he has sustained by reason of the non-performance of the contract, *including the loss of the [* 291] lease, (d) but not damages and costs arising out of the re-sale of the lease to a third person, these being too remote. (e)

Actions by Landlords for Use and Occupation of Premises. — If lands and houses have been occupied by a tenant under a lease void as to the duration of the term by the statute of frauds, the rent reserved in the lease will be the measure of damages resulting from the breach of the implied contract to pay for the actual use and occupation of the property. (f) But when no rent has been fixed upon or ascertained by the agreement of the parties, or the contract has been so far departed from that the stipulated rent forms no just criterion of value, the actual pecuniary value of the occupation will constitute the damage recoverable by the plaintiff. In case of an eviction from part of the premises, the jury must ascertain, independently of any agreement, what ought to be paid. (g)

Damages for Breach of Covenants for Quiet Enjoyment. — A lessee under a void lease who has been ejected by the successor of the lessor has a right, in an action against the executors of the lessor for breach of a covenant for quiet enjoyment contained in his lease, to recover the value of the term. (h)

(c) *Locke v. Furze*, 19 C. B. N. S. 96; 34 L. J. C. P. 201; 35 ib. 141; L. R. 1 C. P. 441.

(d) *Robinson v. Harman*, 1 Exch. 855; 18 L. J. Ex. 202. See, however, *Wigsell v. School for Ind. Blind*, 8 Q. B. D. 357; see *post*, p. * 1107.

(e) *Spedding v. Nevell*, L. R. 4 C. P. 212; 38 L. J. C. P. 133.

(f) *Ante*, pp. * 234- * 237; *De Medina v. Polson*, Holt, 47.

(g) *Tomlinson v. Day*, 2 B. & B. 681.

(h) *Williams v. Burrell*, 1 C. B. 428.

Damages for Breach of Covenant not to assign. — The measure of damages for a breach by an assignee of the lease of a covenant not to assign without license, is such a sum as will, as far as money can, put the plaintiff in the same position as if he had still the defendant's liability, instead of the liability of another of inferior pecuniary ability, for breaches both past and future. (*i*)

Damages for Breach of Covenant to repair. — In an action for breach of a covenant to repair, the proper measure of damages is the amount that it will take to put the premises into repair; (*k*) but in estimating the damages to be recovered, the age and general state and condition of the property at the time of the demise must, as we have already seen, be taken into consideration. (*l*) If buildings fall to the ground by reason of the neglect of the covenantor to repair them, or if they are blown down by the wind or burned by an accidental fire, the proper measure of damages is the amount that it will take to re-build, deducting the difference in value between old materials and new, as the landlord is not entitled to be put in a better position [**292*] than he was in before the fire took * place, and cannot have the value of a new house when the one he has lost was an old house. (*m*) If there be both a covenant to repair and a covenant to insure against loss from fire for a specific sum, the liability of the covenantor in respect of the cost of rebuilding in case the premises are burned down is not limited to the amount of the sum covenanted to be insured. (*n*) If the party suing upon the covenant is only tenant for life, with remainder in tail and a reversion in fee, he can only recover such damages as are commensurate with his life estate. (*o*) Where a defendant held premises under a lease with a covenant to keep and yield them up in repair, and at the expiration of the lease the premises were dilapidated to an amount fixed by the jury at £22,

(*i*) *Williams v. Earle*, L. R. 3 Q. B. 739; 37 L. J. Q. B. 231.

(*k*) *Vivian v. Champion*, 2 Raym. 1125; *Davies v. Underwood*, 2 H. & N. 571; 27 L. J. Ex. 113; *Bell v. Hayden*, 9 Ir. C. L. R. 301.

(*l*) *Ante*, pp. *237–242; *Burdett v.*

Withers, 2 N. & P. 123; *Paine v. Hayne*, 16 M. & W. 541; 16 L. J. Ex. 130.

(*m*) *Yates v. Dunster*, 11 Exch. 15; 24 L. J. Ex. 226.

(*n*) *Digby v. Atkinson*, 4 Campb. 275.

(*o*) *Evelyn v. Raddich*, Holt, 543; *Bedingfield v. Onslow*, 3 Lev. 209.

and the plaintiff had, before this time, made a verbal agreement with a third person to grant him a lease for a long term, and at once proceeded to pull down the premises, it was held that the plaintiff was, notwithstanding, entitled to recover substantial damages. (*p*)

If a lessor has covenanted to repair a dwelling-house demised by him, and the building is destroyed by fire or becomes ruinous and uninhabitable, the lessee may re-build, if the lessor neglects so to do within a reasonable period after request; and the measure of damages to be recovered by the lessee in such a case will be the costs and expenses of the re-building. We have already seen that covenants to pay rent and covenants to repair, contained in a lease, are independent covenants (*ante*, p. *228), and that the lessee is not exonerated from his liability to pay rent under his covenant so to do by reason of the non-performance of the lessor's covenant to repair. If, therefore, the lessor neglects to fulfil his covenant, and delays making the repairs, he is responsible in damages for expenses incurred by the lessee in procuring a suitable residence to reside in whilst he is prevented from having the use and enjoyment of the house during the period of delay or neglect to fulfil the covenant. But if the lessor fulfils his covenant by repairing as soon as he reasonably can, he will not then be responsible for the rent of a house which the lessee may be obliged to take for a residence whilst the repairs are being executed. (*q*) If an action is brought against an assignee of a lease for damages for a breach of covenant to repair, in respect of dilapidations that accrued during the time he was assignee, the criterion of damage is the loss which the landlord would sustain by the non-repair if he went into the market to sell the reversion. (*r*) If an under-lessee refuses to *repair according to his agreement, and his [*293] immediate lessor (the mesne landlord), who is himself a lessee, and bound under pain of forfeiture to keep the premises in repair, enters and repairs them, the measure of damages is the sum necessarily expended in putting them into repair, and not

(*p*) *Rawlings v. Morgan*, 18 C. B. N. Exch. 161; 23 L. J. Ex. 85; *Doe v. Rowlands*, 9 C. & P. 739; *Bell v. Hayden*, 9 s. 776; 34 L. J. C. P. 185.

(*q*) *Green v. Eales*, 2 Q. B. 225.

(*r*) *Martin, B., Smith v. Peat*, 9 London Union, L. R. 8 C. P. 79.

the costs of an action brought by the original lessor against the mesne landlord for non-repair, unless the under-lease contains a covenant to indemnify, (*s*) or to perform the covenants of the head-lease. (*ss*)

Breach of Covenants to consume Hay and Straw on a Farm. —

If a tenant who has covenanted not to carry away hay or straw from the demised premises nevertheless sells it off the land, the proper measure of damages is not the value of the hay or straw, which is the property of the tenant, but the value of it to the land in the shape of manure, if it had been eaten and consumed by cattle and deposited on the soil. Where the landlord had agreed to purchase the outgoing tenant's straw at a valuation, and the tenant by the terms of the lease was to return the manure value of straw sold off, it was held that the landlord must pay a fodder price, which is one-half the market price; (*t*) and where the tenant was not to sell straw off the land without returning the value of it in manure, it was held that the tenant was not bound to return the marketable value, but the manure value of the straw to the premises. (*u*)

Damages for Holding over. — If the tenant holds over, the landlord may in some cases, as we have seen (*ante*, p. * 277), recover double the yearly value, or he may recover the damages and costs he has incurred by not being able to give possession to the succeeding tenant, (*v*) and also the costs incurred in ejecting the person in possession. (*y*)

Of Contracts for the Letting and Hiring of Furnished Houses and Lodgings.¹ — Contracts for the letting and hiring of ready furnished houses and apartments are contracts of a mixed nature,

¹ See an article on Furnished Apartments, by R. V. Rodgers, 12 West. Jur. 271; also, *Dutton v. Gerrish*, 9 Cush. 89; *Minor v. Sharon*, 112 Mass. 477; *Dyett v. Pendleton*, 8 Cow. 727; *Westlake v. De Graw*, 25 Wend. 669; *Gilhooly v. Washington*, 4 N. Y. 217, 3 Sandf. 330; *Witty v. Matthews*, 52 N. Y. 512; *Jaffe v. Harteau*, 56 N. Y. 398; *McAlpin v. Powell*, 70 N. Y. 126; *Nowlan v. Trevor*, 2 Sweeney, 67; *Kimmell v. Burfeind*, 2 Daly, 155; *Fash v. Kavanagh*, 24 How. Pr. 347; *Stapenhorst v. American Manuf. Co.*, 15 Abb. Pr. n. s. 355.

(*s*) *Logan v. Hall*, 4 C. B. 598; *Smith v. Howell*, 6 Exch. 737; *Walker v. Hatton*, 10 M. & W. 249; *Colley v. Streeton*, 2 B. & C. 273; *Clow v. Brogden*, 2 Sc. N. R. 303.

(*ss*) *Horby v. Cardwell*, 8 Q. B. D. 329.

(*t*) *Clarke v. Westrope*, *ante*, p. * 287.

(*u*) *Lowndes v. Fountain*, p. * 287.

(*x*) *Bramley v. Chesterton*, 2 C. B. n. s. 592; 27 L. J. C. P. 23.

(*y*) *Henderson v. Squire*, L. R. 4 Q.

B. 170; 38 L. J. Q. B. 73.

partaking partly of the nature of a demise of realty, and partly of a contract for the letting and hiring of movable chattels (*post*, Sect. III.); and the lessor, therefore, in contracts of this description is clothed with the duties and responsibilities resulting from contracts for the letting and hiring of chattels in addition to those which have been previously described as flowing from demises of realty simply.

Implied Warranties on the Part of Lessors of Furnished

* **Apartment.**— If a man furnishes a dwelling-house or [*294] an apartment in a house, and offers it to be let ready furnished, he impliedly holds it out as fit for immediate habitation and use, and the contract for the letting and hiring of it is analogous to a contract for the letting and hiring of a ship rigged and manned and prepared for sea, or of a carriage horsed and equipped and made ready for a journey on land; and there is, consequently, an implied warranty on the part of the lessor that such ready-furnished house or lodging is reasonably fit for habitation and occupation by a tenant. If apartments have been taken on condition that they were reasonably fit for habitation and the furniture for use, and the furniture is unfit for use, or is encumbered with a nuisance of so serious a nature as to deprive the tenant of all beneficial enjoyment of it, the latter is entitled to throw up both house and furniture, and bring an action against the landlord for a breach of contract. Thus, where the beds of a ready-furnished house, let to a tenant at a rent of eight guineas per week, were so infested and over-run with bugs that they could not be slept in, it was held that the tenant was justified in leaving the house and resisting the landlord's demand for the rent. (z) "In the case of a contract for the hire of a ready-furnished house," observes Lord Abinger, "the letting of the goods and chattels as well as the house implies that the party who lets the house so furnished is under an obligation to supply the other contracting party with whatever goods and chattels may be fit for the use and occupation of such a house, according to its particular description, and suitable in every respect for his use." (a)

(z) *Smith v. Marrable*, 11 M. & W. 5, cited 12 M. & W. 60, 65, 87; *Campbell v. Lord Wenlock*, 4 F. & F. 716.

(a) *Sutton v. Temple*, 12 M. & W. 60; see also *Wilson v. Finch Halton*, 2 Ex. D. 336.

Rights and Liabilities of Lodging-house Keepers and Lodgers.—

It has been held that a contract for board and lodging, where the lodging-house keeper undertakes generally to provide food and shelter for man and beast, and does not agree to let any particular room, is not a contract for an interest in land. (*b*) A tenant of lodgings is not always entitled to the exclusive possession of his rooms. He may sometimes have "a mere easement of sleeping in one room and eating and drinking in another;" and the landlord and his servants may have a right to enter at all times. (*c*) When a man lets apartments in a house, he impliedly demises them with all their proper accompaniments, and warrants to the hirer the use of all such accessorial things as are necessary to enable him to enjoy the principal subject-matter of the demise in the manner intended. He impliedly grants to the tenant the use of the door-bell, the knocker, [*295] the skylights or windows of the staircase, and * the use of the water-closet, unless it be otherwise stipulated at the time of the taking of the lodgings; and if the landlord deprives him of the use of either, he forthwith subjects himself to an action for a breach of contract. (*d*) The lodging-house keeper, moreover, who remains in the general possession of the house, is bound to exercise all ordinary and reasonable care for the protection of the persons and property of his tenants and lodgers; to see that the outer door is fastened at night, and that strangers or suspected or doubtful characters are not permitted, unknown to the lodger, to congregate in the house at unseasonable hours of the night. He is bound, moreover, to exercise ordinary care and vigilance in the selection and appointment of the servants and domestics within the house, and to take all such precautions as a prudent householder may be expected to take to guard against robbery and fire; but he is not responsible for the safe keeping of the property of his lodgers, (*c*) unless it has been delivered into his hands to be safely kept (*post*, *356). If, after having taken ordinary care in the selection of his servants, a theft is

(*b*) *Ante*, p. *160.(*c*) *Maule, J.*, 3 C. P. 784.(*d*) *Underwood v. Burrows*, 7 C. & P. 28.(*c*) *Holder v. Soulby*, 8 C. B. N. S. 254; 29 L. J. C. P. 246.

committed on the property of a lodger, in consequence of the front door having been incautiously left open by one of the servants who has been sent out on an errand by the guest, the lodging-house keeper is not responsible for the loss. (*f*) Nor is he responsible for the loss of things stolen from the lodgers by his own servants. (*g*)

The lodger, on the other hand, may be sued for use and occupation (*ante*, p. * 234); and, if he brings goods and chattels of his own upon the premises, they may be distrained for the rent of the lodgings, as in the ordinary cases of demises of pure realty. (*h*) If the possession as well as the use of the furniture is granted to the lessee, the latter is bound to deliver up the furniture at the expiration of the term in good order and condition, deteriorated only by ordinary wear and tear and the reasonable use of it. If he received linen, plate, and household utensils clean and fit for use, and agreed "to leave them as he found them," he is bound to render the things back to the lessor in a clean state. (*i*)

Destruction of Buildings by Fire. — Where a contract is entered into for the use of a furnished saloon for the giving of a concert, and the saloon is destroyed by fire before the time appointed for the concert, the parties to the contract are excused from performance of it. (*k*)

Proof of the Duration of the Term of Hiring. — Lodgings and * ready-furnished apartments are rarely the [* 296] subject of a yearly hiring; and there is no presumption, from a general holding thereof, in favor of a hiring for a year, and from year to year, as in the case of a demise of land. (*l*) The duration of the term corresponds in general with the time limited for the payment of the rent. If the rent is payable quarterly, the presumption is in favor of a hiring by the quarter; if, on the other hand, it is payable monthly or weekly, there is a hiring by the month or week. The same rules prevail in the French law. (*m*) Where a tenant agreed to pay for

(*f*) *Dansey v. Richardson*, 3 E. & B. 144; 23 L. J. Q. B. 217.

(*g*) *Holder v. Soulby*, *supra*.

(*h*) *Newman v. Anderton*, 5 B. & P. 227.

(*i*) *Stanley v. Agnew*, 12 M. & W. 827.

(*k*) *Taylor v. Caldwell*, 32 L. J. Q. B. 165; *post*, p. * 356.

(*l*) *Willson v. Abbott*, 4 D. & R. 694.

(*m*) *Pothier, Louage*, No. 30.

the occupation of furnished apartments, "from March the 4th to September the 4th, the sum of £52 10s.," also "to occupy the rooms from the 4th of September to the 4th of December on the same terms, viz., £26 5s. for the three months, or to take them unfurnished at the *rate* of £84 per annum," it was held that this was a lease for six months and for a further period of three months, and not a lease from year to year. (*n*)

Notice to Quit. — If the tenancy is for one single quarter, month, or week, no notice to quit is requisite, as the duration of the holding is fixed and determined; but if the hiring be from half-year to half-year, half-a-year's notice to quit must be given; if from quarter to quarter, a quarter's notice; if from month to month, a month's notice; and if from week to week, a week's notice to quit is, in general, requisite by custom and usage. (*o*) If there is no custom, a reasonable notice is requisite; (*p*) and if the lodger quits his apartments without giving such notice, he is liable to the payment of a quarter's, a month's, or a week's rent, according to the term of hiring; and the lodging-house keeper may recover such rent, although he has put a bill in the windows advertising the apartments to be let, or has lighted fires in and used the rooms. (*q*) The length of the notice may be otherwise regulated by the express agreement of the parties, and also by the custom and usage of the district. It must, however, in all cases expire at the end of the current term of hiring. If a tenant remains in possession of lodgings after the termination of his term of hiring, or after the expiration of a notice to quit, the landlord may, as we have seen, assert his rights by force (*ante*, p. * 279).

Letting and Hiring of Stowage and Places of Deposit. — A contract for the letting and hiring of a vault, or store, or place of deposit in a warehouse, is a contract analogous to the letting and hiring of an apartment in a house for the [* 297] occupation of a * tenant or lodger. But the landlord only contracts that the place is fit for use so far as rea-

(*n*) *Atherstone v. Bostock*, 2 Sc. N. R. 643.

(*o*) But the custom must be proved; *Huffel v. Armistead*, 7 C. & P. 56.

(*p*) *Jones v. Mills*, 10 C. B. N. s. 788; 31 L. J. C. P. 66.

(*q*) *Redpath v. Roberts*, 3 Esp. 225; *Griffith v. Hodges*, 1 C. & P. 419; *ante*, p. * 263.

sonable care can make it so ; and, therefore, where a tenant hired the ground floor of a warehouse, the upper part of which was occupied by the landlord himself, and the water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains, and a hole was made in the box by rats, through which the water entered the warehouse and wetted the tenant's goods, but the landlord had exercised reasonable care in examining and seeing to the security of the gutters and box, it was held that he was not liable for the damage so caused. (r) In the civil law, a man who let out a store or place of deposit for corn, wine, oil, or merchandise of a perishable character, impliedly warranted his store-house to be fit for the purpose for which it was known to be required. If the hirer had inspected it, and approved it prior to the contract, the store-keeper was not responsible for patent defects which the hirer might by the exercise of ordinary vigilance have made himself acquainted with ; but for all latent defects causing injury to the property deposited he was responsible. If the store-room was in a roofed building, he was bound to keep the roof water-tight. If the places of deposit were upon or below the surface of the ground, he was bound to keep them properly drained and free from water. If he remained in the general possession of the premises, it was his duty to see that the outer gates were fastened at a proper hour of the night, that suspicious characters were not permitted to lurk about the spot, and that the rooms and stores were watched with proper and reasonable care. (s) He was bound, in short, to take all ordinary precautions to secure his store-house from attacks from without and from dangers within, from damage by fire and damp, and from all things hurtful to the property deposited beneath his roof.

Room or Standing-Places in Factories. — An agreement for the use of room in a factory for the purpose of working machines will amount to a demise if it is a letting of a defined portion of the room separated from the remaining portion, with exclusive possession by the person taking it, but will not amount

(r) *Carstairs v. Taylor*, L. R. 6 Ex. 217 ; 40 L. J. Ex. 129.

(s) *Pandect. ed. Poth.*, lib. 19, tit. 2, sect. 3, art. 3, 71.

to a demise if it is a mere letting of an on-stand for a machine. (t)

Lodgings in Common Inns¹ — **Who may be said to be a Common Innkeeper.** — Every person who makes it his busi-

¹ See Schouler, Bailm. Part V., c. 2; Redf. Carriers, Part V.; article by W. W. Ramsay on Innkeepers and their Liabilities, 14 Cent. L. J. 206; U. S. Dig. tit. *Innkeepers*; also a volume of "Legal Recreations," — Hotel Life, by R. V. Rodgers.

An innkeeper receiving, with a guest, cattle which the latter is driving along the road, to keep them over night, is responsible for the sufficiency of the place provided for the beasts (*Hilton v. Adams*, 71 Me. 19); but one with whom a traveller leaves a horse, without himself stopping at the inn as guest, is merely a bailee for hire (*Healey v. Gray*, 68 Me. 489).

An innkeeper is answerable for the conduct of those whom he employs as servants (*Rockwell v. Proctor*, 39 Ga. 105), or for that of another guest, whom he places in a room already occupied, without the occupant's consent (*Dessauer v. Baker*, 1 Wilson, Ind. 429); but not for goods which a guest, their owner, has directly entrusted to another guest (*Houser v. Tully*, 62 Pa. St. 92).

The strict common law liability of an innkeeper for baggage obtains in favor of travellers only, not of boarders. *Lusk v. Belote*, 22 Minn. 468; and see *Hall v. Pike*, 100 Mass. 495; *Vance v. Throckmorton*, 5 Bush, 41.

An innkeeper who also keeps a sea-bathing house distinct from his inn, is not liable (without negligence) for the goods and clothing of his guests deposited by them in the bathing-house while their owners are bathing, and stolen therefrom. *Minor v. Staples*, 71 Me. 316.

The presumption of an innkeeper's negligence raised by the loss of the guest's goods or chattels placed in his charge, may be repelled by showing their perishable or changeable character; as in case of a horse, that it was diseased. *Howe Machine Co. v. Pease*, 49 Vt. 477.

Where a guest takes to his room valuable articles of merchandise, and keeps them there for exhibition and sale, the hotel-keeper is relieved, as to such merchandise, from the special liability (*Myers v. Cottrill*, 5 Biss. 465); and the same principle was applied where defendant agreed to keep plaintiff's stallion for two days in each week during the breeding season, and to furnish oats for the horse and meals for a man in charge, the horse having been lost in burning of the stable (*Mowers v. Fethers*, 61 N. Y. 34).

If a guest, after paying his bill to depart, leaves money or valuables to be kept for him without compensation, the landlord is as to these a mere gratuitous bailee (*Whitemore v. Harroldson*, 2 Lea, 312; and see *Adams v. Clem*, 41 Ga. 65); and so he is if a guest, notified to leave for non-payment of charges, leaves without securing his baggage (*Lawrence v. Howard*, 1 Utah T. 142).

A hotel-keeper is not liable for a loss occasioned by the personal negligence of the guest, such as his leaving in the "coat-room" two travelling-bags, one of them not locked, containing valuable jewelry, when there was a safe provided for the keeping of such property, and notice thereof was posted as prescribed by law (*Elcox v. Hill*, 98 U. S. 218); or where the guest has disregarded a rule of the

(t) See *Selby v. Greaves*, L. R. 3 C. B. N. s. 429; 32 L. J. C. P. 252, where P. 594, where it was held there was a the contrary was held; see also 41 Vict. demise, and *Hardwick v. Austin*, 14 C. c. 16, sect. 93.

ness to entertain * travellers and passengers, and provide [* 298] lodging and necessaries for them and their horses and attendants, is a common innkeeper; and it is in no way material whether he have any sign before his door or not. (u) A London "coffee-house," where beds and provisions are furnished by the day, or for the night, or for a longer period, to all persons who may think fit to apply for them, is a common inn; and all persons who are willing and able to pay the customary hire are entitled to be received as guests at an inn, whether they are wayfarers or travellers, or merely residents in the locality. (x) But if a man merely opens a house for the sale of provisions and refreshments, and does not profess to furnish beds and lodging for the night, he is not a common innkeeper. (y) And if he pro-

house, reasonable, known to him, and not specially waived (*Fuller v. Coates*, 18 Ohio St. 343); or where the guest omitted to fasten a window, and the jury find him to have been culpably careless (*Bohler v. Owens*, 60 Ga. 185); or where intoxication of the guest directly contributed to the loss (*Walsh v. Porterfield*, 87 Pa. St. 376). But an innkeeper was held liable for theft of a watch, notwithstanding the guest left his door unlocked, in *Classen v. Leopold*, 2 Sweeny, 205. And it is not negligence for a guest to leave his door unlocked when requested to do so by the innkeeper; here, for the purpose of permitting another occupant of the room to enter late at night. *Milford v. Wesley*, 1 Wilson (Ind.) 119.

Retention of money or valuables by a guest upon his person does not constitute such exclusive control thereof as will exonerate the innkeeper, where the loss is not induced by the guest's negligence or misconduct. *Jalie v. Cardinal*, 35 Wis. 118.

A printed notice held not binding on a guest without proof that it was seen or assented to by him. *Bernstein v. Sweeny*, 33 N. Y. Superior Ct. 271; see *Bodwell v. Bragg*, 29 Iowa, 232, and *Kellogg v. Sweeny*, 1 Lans. 397.

See as to who are innkeepers, *Krohn v. Sweeny*, 2 Daly, 200; that a palace-car company is not one, *Pullman Palace Car Co. v. Smith*, 73 Ill. 360. Who are guests, *Walling v. Potter*, 35 Conn. 183; *Coykendall v. Eaton*, 55 Barb. 188. What is needful to constitute the relation of innkeeper and guest, *Fitch v. Casler*, 17 Hun, 128; *Hancock v. Rand*, ib. 279. Civil rights of colored persons at inns, the Civil Rights Bill, 1 Hughes, 541. As to special agreements between guests and clerk, for the safe keeping of particular property, see *Coykendall v. Eaton*, 40 How. Pr. 266; *Murray v. Clark*, 2 Daly, 102.

A boarding-house keeper is liable for loss of his guest's property, occasioned through the negligence of his servants, while acting within the scope of their employment. *Smith v. Reed*, 52 How. Pr. 14.

The proprietor of a boarding and lodging house is liable for theft of a guest's goods committed by a stranger, whom the housekeeper employed by the proprietor negligently permitted to visit the guest's room. *Smith v. Reed*, 6 Daly, 33.

(u) Bac. Abr. *Inns* (B); *Parker v.*
Flint, 12 Mod. 255.

(x) *Thompson v. Lacy*, 3 B. & Ald.
283.

(y) *Doe v. Laning*, 4 Campb. 77.

fesses to let only private lodgings, and does not offer his house to the public as a place of reception and entertainment and lodging for all comers who are able and willing to pay for the accommodation offered, he cannot be said to keep a common inn.

Duties of Innkeepers.— Every man who opens an inn by the wayside, and professes to exercise the business and employment of a common innkeeper, is, by the custom of the realm, bound to afford such shelter and accommodation as he possesses to all travellers (*z*) who apply and tender, or are able and ready to pay, the customary hire, and are not drunk or disorderly, or laboring under contagious or infectious diseases. And if he neglects or refuses so to do, he is liable to an action for the recovery of any damages that may have been sustained by reason of such refusal, and also to an indictment at common law. (*a*) The innkeeper is bound, moreover, if he has room in his stables, to receive and provide for the horses of travellers who alight at his inn, intending to become guests and to lodge there; but he is not bound to receive horses from parties who merely intend to make use of his stables as livery and bait stables, resorting elsewhere for lodging and entertainment; nor is he bound to receive the goods of a person who professes merely to make use of the inn as a place of deposit, and not to lodge there as a guest. (*b*) Neither is he bound to provide for his guest the precise room that the latter may choose to select, nor to provide him with a bedroom if he declares it to be his intention to sit up all night. All that he is required to do is to find reasonable and proper accommodation for his guests; and if he tenders such [* 299] accommodation, and the guest *refuses it, he may compel the latter to quit the inn, and seek for accommodation and lodging elsewhere. (*c*)

The extent of the public duty and obligation of the innkeeper depends mainly upon the nature of his public profession. If he has only a stable for a horse, he is not bound to receive a car-

(*z*) *Taylor v. Humphreys*, 30 L. J. M. C. 212; see *Copley v. Burton*, L. R. 5 C. P. 489.

(*a*) *Hawthorn v. Hammond*, 1 C. & K. 404; *Howell v. Jackson*, 6 C. & P. 725; *Rex v. Ivens*, 7 C. & P. 219.

(*b*) *Smith v. Dearlove*, 6 C. B. 132; *Binns v. Pigot*, 9 C. & P. 209; but see *Day v. Bather*, 2 H. & C. 14.

(*c*) *Fell v. Knight*, 8 M. & W. 276.

riage. If he professes only to receive ordinary luggage accompanying the person of a traveller, he is not bound to take in articles of unusual, extraordinary, and inconvenient bulk, nor goods which do not accompany the person of the guest. (*d*) An innkeeper is not an insurer of the goods of his guest, but is answerable for negligence. (*e*)

The innkeeper cannot discharge himself of the duty and burthen imposed upon him by the common law by express notice to his guests, (*f*) or under pretence of sickness, want of understanding, or absence from home; (*g*) but if an infant keeps a common inn, an action upon the custom of inns will not lie against him, for his privilege of infancy shall be preferred, and take place of the custom. (*h*)

The liability of the innkeeper as such will continue, it seems, for some reasonable time after the departure of a guest who has left his goods to be sent for with the landlord's consent; (*i*) and it is certain that his liability continues during the temporary absence of his guest (*k*), for where the plaintiff went away from an inn, stating that he would return the following Monday, and left his horse at the inn, and did not return for a fortnight, it was held that the innkeeper was liable for an injury to the horse, caused by negligence, as the relation of innkeeper and guest existed until something was done to indicate the contrary.

Of the Protection of the Guest from Robbery and Theft. — It is said that the innkeeper is not liable for the loss of his guest's goods by burglary or robbery with violence, where he can show that the force which occasioned the loss was truly irresistible. (*l*) But however this may be, it is certain that to the duties and obligations which attach to innkeepers in common

(*d*) *Broadwood v. Granara*, 10 Exch. 423; 24 Law J. Exch. 1.

(*e*) *Calye's case*, 1 Sm. L. C. 5th ed. 102; *Dawson v. Chamney*, 5 Q. B. 164. As to liability to person coming to the inn but not to deal there, see *Oxford v. Prior*, 14 W. R. 611; and as to a temporary caller for refreshment, see *Bennett v. Mellor*, 5 T. R. 173.

(*f*) *Morgan v. Ravey*, 6 H. & N. 265;

30 Law J. Exch. 131; see, however, 26 & 27 Vict. c. 41, *post*, *302.

(*g*) *Bac. Abr. Inns* (C) 4.

(*h*) *Cross v. Androes*, Roll. Abr. 2; Carth. 161.

(*i*) See *per Brown, C. J.*, in *Adams v. Clem*, 41 Ga. 67.

(*k*) *Day v. Bather*, 2 H. & C. 14.

(*l*) *Jones on Bailments*, 96.

with all lodging-house keepers and lessors of furnished rooms and apartments for immediate occupation, the law has [*300] superadded the * duty of protecting the goods of their guests from robbery. (*m*) But if the guest's servant, or he who come with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged; for there the fault is in the guest to have such a companion or servant. (*n*) The innkeeper will not be liable if the loss would probably not have happened had the guest used the care which a prudent man might reasonably have been expected to take under the circumstances. (*o*)

Where a guest laid a reticule containing money on her bed, and afterward went into her sitting-room, the door of which was opposite the bedroom, and remained there about five minutes, and then sent her companion for the reticule, which was missing, and could not afterward be found, it was held that the innkeeper was bound to make good the loss. (*p*)

A traveller went to an inn, taking with him divers packages of silk, some of which were taken up-stairs to his bedroom, and others were, by his directions, carried into the commercial room, into which he was shown. After remaining for some days therein, and after having been several times taken out and brought back again by the traveller, the goods were stolen, and an action having been brought against the innkeeper to recover the value of the property, it was shown to be the practice of the inn to take all the luggage of the guests into their bedrooms, unless orders to the contrary were given; and it was contended that the traveller, by ordering the goods to be taken into the commercial room, which was a place of common resort for all the guests indiscriminately, had taken the goods under his own protection, and could not therefore make the innkeeper responsible for the loss; but the court held that, if the innkeeper had intended not to be responsible for goods deposited by the guests in the com-

(*m*) *Morgan v. Ravey*, 6 H. & N. 265; 30 L. J. Ex. 131; but see now the 26 & 27 Vict. c. 41, *post*, p. *302. As to the sufficiency of notice under the act, see *Spice v. Bacon*, 3 Ex. D. 463.

(*n*) *Calye's case*, 8 Co. Rep. 32 a.

(*o*) *Oppenheim v. White Lion Hotel Company*, L. R. 6 C. P. 515; 40 L. J. C. P. 93.

(*p*) *Kent v. Shuckard*, 2 B. & Ad. 803.

mercial room, he should have declared his intention to them at the time the goods were placed there. (*g*) But if the guest is guilty of gross negligence in leaving a box containing money or bank-notes in the commercial room, after having opened it and exposed the contents to the bystanders, he cannot, if the money is stolen, charge the innkeeper with the loss. (*r*)

A servant having been sent with goods to market, and being unable to sell them, went to an inn, and asked if he could leave *the goods there until next market-day. [*301] The innkeeper's wife said they were very full of parcels, and declined to take charge of them. The servant then sat down in the inn, ordered something to drink, and put the goods on the floor immediately behind him. When he got up again the goods were gone, and were never afterward seen or heard of, and it was held that the innkeeper was responsible for the loss. (*s*) But "if a guest come to a common innkeeper to harbor there, and he say that his house is full of guests, and do not admit him, &c., and the party say he will make shift among the other guests, and be there robbed of his goods, the innkeeper shall not be charged." (*t*) And if a guest takes upon himself the exclusive charge of the goods which he brings into the house of an innkeeper, he cannot afterward charge the innkeeper with the loss. (*u*) "I agree," observes Lord Ellenborough, "in what is stated in *Calye's case*, that the mere delivery of the key of a room will not dispense with the care and attention due from the landlord, and that he cannot exonerate himself by merely handing a key over to his guest; but if the guest take the key, it is a very proper question for a jury whether he takes it *animo custodiendi*, and for the purpose of exempting the landlord from his liability, or whether he takes it merely because the landlord forced it upon him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room." (*x*) And where a guest, having the key delivered to him, omits to use it, and a thief comes into his room by the door and

(*g*) *Richmond v. Smith*, 8 B. & C. 9.

(*t*) *White's case*, Dyer, 158 b.

(*r*) *Armistead v. White*, 20 Law J. Q. B. 524; s. c. nom. *Armistead v.*

(*u*) *Farnworth v. Packwood*, 1 Stark. 249.

Wilde, 17 Q. B. 261.

(*x*) *Burgess v. Clements*, 4 M. & S.

(*s*) *Bennet v. Mellor*, 5 T. R. 276.

310; 1 Stark. 252, n.

steals his goods, that is, or may be, evidence for the jury of contributory negligence, which will disentitle him to recover against the innkeeper. The question is whether the loss would or would not have happened if the guest had used the ordinary care that a prudent man might be reasonably expected to take under the circumstances; (*y*) "what would be prudent in a small hotel in a small town might be the extreme of imprudence in a large hotel in a large city, where probably three hundred bedrooms are occupied by people of all sorts." (*z*)

Whenever the goods and chattels of the guest have been actually delivered to the innkeeper or his servants, the latter cannot, of course, discharge himself from the strict common law responsibility by showing that the goods were stolen outside the inn, if he has himself placed them in the spot from whence they have been taken. Where the plaintiff, a farmer, drove his horse and gig to an inn on a market day, and the hostler took the [*302] horse *out of the gig and put him into a stable, and then placed the gig outside of the inn-yard, in a part of the open street where the innkeeper was in the habit of placing the carriages of his guests on fair-days, and the gig was stolen therefrom by some person unknown, it was held that the innkeeper was responsible for the loss. (*a*) And the innkeeper is liable, although sick at the time, and incapable of attending to his affairs, for he is bound to retain trusty servants to secure the goods of his guests when incapable of doing so himself. (*b*) This extended responsibility of the innkeeper, which makes him an insurer of the goods against loss by robbery, does not extend to losses occasioned by an accidental fire (14 Geo. III. c. 78, sect. 86), nor to damage or injury to the goods which is the result of accident. The innkeeper is not responsible for injuries which the horses of guests inflict upon each other in the stables of the inn, provided he has taken all due care to prevent the introduction into the stables of vicious and kicking horses. (*c*).

(*y*) *Oppenheim v. White Lion Hotel* (b) *Cross v. Andrews*, Cro. Eliz. C. C., L. R. 6 C. P. 515; 40 L. J. C. P. 622.
231.

(*z*) *Per Montague Smith, J., s. c.* (c) *Dawson v. Chamney*, 5 Q. B. 105, explained and qualified by *Morgan v. (a) Jones v. Tyler*, 1 Ad. & E. 522; 3 Ravey, 30 Law J. Exch. 134.
N. & M. 576.

Limitation by Statute of the Liability of Innkeepers.¹—By 26 & 27 Vict. c. 41, sect. 1, it is enacted that no innkeeper shall be liable to make good to any guest any loss of, or injury to, goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of *thirty pounds*; except where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper, or any servant in his employ, or where such goods or property shall have been deposited expressly for safe custody with such innkeeper.

If any innkeeper refuses to receive for safe custody any goods or property of his guest, or if any guest, through any default of such innkeeper, is unable to deposit such goods or property as are mentioned in the act, the innkeeper will not be entitled to the benefit of the act in respect of such goods or property (sect. 2). In the case of a deposit for safe custody, the innkeeper may require, as a condition of his liability, that the goods or property be deposited in a box or other receptacle, fastened and sealed by the person depositing the same (sect. 1).

¹ Similar statutes exist in many of the United States. Under a Missouri law of this description, which requires that a copy of the law itself shall be posted in the rooms of an inn, the fact that a guest has read its provisions in the register of arrivals has been held no defence to an action founded on the innkeeper's liability; the act must be posted in his chamber. *Batterson v. Vogel*, 8 Mo. App. 24.

Under the New York statute, the innkeeper is not liable if the guest had sufficient time and opportunity to deposit the jewelry stolen, even though there may have been no negligence on his part. *Rosenplaenter v. Roessle*, 54 N. Y. 262. The statute does not affect the common law liability for valuables stolen from a guest's trunk after the guest has packed it, locked his room, given notice of his departure, and delivered the key of his room to the clerk to have his trunk brought down. *Bendetson v. French*, 46 N. Y. 266; see also *Kellogg v. Sweeney*, ib. 291. The protection given to innkeepers by the statute is not limited to money or valuables in excess of what the guest may reasonably require for travelling expenses or personal convenience. *Hyatt v. Taylor*, 42 N. Y. 258; see also *Ramaley v. Leland*, 43 N. Y. 539. If a guest complies with the statute and makes the deposit, the innkeeper is liable, as at common law, for the full value received. *Wilkins v. Earle*, 44 N. Y. 172.

That such statutes do not include a guest's watch or watch-chain, see *Milford v. Wesley*, 1 Wilson (Ind.), 119; *Bernstein v. Sweeney*, 33 N. Y. Superior Ct. 271.

Under the New York statute exempting an innkeeper from liability for loss of a guest's property in a barn or outbuilding by fire, if incendiary, and occurring without negligence on the landlord's part, the burden is upon the innkeeper to show absence of negligence, and that the fire was incendiary. *Faucett v. Nichols*, 64 N. Y. 377; *Cutler v. Downey*, 30 Mich. 259.

Every innkeeper is required to cause at least one copy (*d*) of the first section of the act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he is entitled to the benefit of the act in respect of such [* 303] goods or * property only as shall be brought to his inn while such copy shall be exhibited (sect. 3). By the interpretation clause (sect. 4) it is declared "that the word inn shall mean any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests, and the word 'innkeeper' shall mean the keeper of any such place."

Losses occasioned by the Misconduct of the Guest. — If a guest at an inn asks for a private room for the purpose of exhibiting goods for sale, and receives customers, and invites the admission of strangers into the inn, upon whose ingress and egress the innkeeper has no check, the latter is not responsible for the safety of the goods in the room so used. (*e*) And if the guest is himself guilty of negligence in leaving money and valuables about in rooms of common resort, he cannot, if the money and valuables are stolen, charge the innkeeper with the loss. (*f*)

The rule of law resulting from all the authorities is, that the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable for a breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances. (*g*)

Who are Guests and Travellers. — He who seeks to charge another as an innkeeper for the loss of goods must show that he was a traveller and guest at the inn. If a man who has been a guest gives up his room and quits the inn for a few days, intending to return, and asks for permission to leave his goods at the inn, and the innkeeper takes charge of them, the latter is clothed only with the ordinary duties and responsibilities of a bailee, for

(*d*) Such copy should be a correct copy, see *Spice v. Bacon*, L. R. 2 Ex. D. 463, C. A.; 46 L. J. Sc. 713.

(*e*) *Burgess v. Clements*, 1 Stark. 251, n.; 4 M. & S. 306.

(*f*) *Armistead v. White*, *ante*, p. *300; *Sanders v. Spencer*, Dyer, 266 a; and *ante*, p. *301.

(*g*) *Cashill v. Wright*, 6 Ell. & Bl. 900; see *ante*, p. *301.

a man does not become a guest at an inn by the mere delivery of goods to the landlord to keep. (*h*) It has been said, however, that a man may become "a guest by leaving his horse, as much as if he had stayed himself, because the horse must be fed, by which the innkeeper has gain, otherwise than if he had left a trunk or a dead thing." (*i*) "If an host invite one to supper, and, the night being far spent, invites him to stay all night, if he is afterward robbed, yet shall not the host be charged (as an innkeeper), for this guest was no traveller." (*k*)

The length of time that a man may remain at an inn does not affect or alter his character as a traveller, or in any way qualify or * vary the common law liability of the inn- [* 304] keeper. Thus "If A comes with goods to an inn in London, and stays there for a week, month, or longer, and is there robbed of them, he shall have an action against his host; though, perhaps, being at the end of his journey, he cannot then be said to be *transeuns* according to the writ in the register." (*l*) But if a man takes apartments in an inn for a term, by the week, month, or year, for example, or if he resides in an inn under a special contract for his bed and board, he is not in contemplation of law sojourning at the inn as a traveller, but rather in the character of a lodger at a private boarding-house. If, therefore, he is robbed in the house, he cannot charge the landlord as an innkeeper. (*m*) Holt, C. J., is reported to have held "that if one come to an inn and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and as such he is not under the innkeeper's protection; but if he eat and drink there it is otherwise, or if he pay for his diet there, though he do not take it there." (*n*)

Exemption of the Guest's Property from Distress for Rent. — The carriages and horses, goods and chattels, of guests sojourning at public inns cannot be distrained by the landlord for the rent of the premises. (*o*)

(*h*) *Gelley v. Clerk*, Cro. Jac. 188;
Smith v. Dearlove, 6 C. B. 132.

(*i*) *York v. Grindstone*, 1 Salk. 388;
Bather v. Day, 32 Law J. Exch. 171.

(*k*) Bac. Abr. *Inns* (C) 5.

(*l*) Bac. Abr. *Inns* (C) 5.

(*m*) *Warburton, J., Watbroke v. Griffith*, Moore, 877; *Grimston v. Innkeeper*, Hetl. 49.

(*n*) *Parker v. Flint*, 12 Mod. 255.

(*o*) Bro. Abr. *Distress*, pl. 57, 71; 1 Roll. Abr. 68, pl. 12.

Innkeeper's Lien.¹—An innkeeper has a lien upon goods belonging to the guest, and brought by him to the inn, for his charges for board and lodging supplied to the guest; (*p*) and it has been held that the lien attaches even when the goods do not belong to the guest, if the innkeeper receives them in the belief that they do so belong; and also when the goods are such as the innkeeper was not bound to receive; (*q*) and to goods deposited with him by his guest. (*r*) But he cannot detain the person of his guest, or take off his clothing, in order to obtain payment of his bill. (*s*) If he sells the goods his lien is destroyed. (*t*) An innkeeper has now a right to sell goods left at his inn after six weeks, where the person depositing is his debtor, subject to certain provisions. (*u*)

The innkeeper holds the chattels detained by him in the nature of a pledge, so that if he once permits his guest to take them away, and so relinquishes his pledge, he cannot afterward retake them. Therefore if the innkeeper allows his guest to remove his horses after a debt has been incurred for [* 305] keeping them, and they * are afterward brought to the inn and a new debt contracted, the innkeeper can detain them for the latter portion of the debt, but not for the former. (*x*) And it is said that if several horses are brought to an inn by the guest, each is a pledge for its own keep, but not for the keep of

¹ As to an innkeeper's lien generally, see *Domestic Sewing-Machine Co. v. Watters*, 50 Ga. 555; *Manning v. Hollenbeck*, 27 Wis. 202; *Case v. Fogg*, 46 Mo. 440. That it is limited to goods of a guest, and does not attach to those of a boarder, *Pollock v. Landis*, 36 Iowa, 651; *Smith v. Keyes*, 2 Thomp. & C. 650.

As to who are boarding-house keepers, see *Cady v. McDowell*, 1 Lans. 484. Their lien under statute of Connecticut, *Brooks v. Harrison*, 41 Conn. 184; of Wisconsin, *Nichols v. Holliday*, 27 Wis. 406.

A boarding-house keeper has no lien upon the personal property of a married woman for her board, where the contract was made with her husband, not with her. *McIlvaine v. Hilton*, 7 Hun, 594.

When weekly board money becomes due. *Singer v. Townsend*, 53 Wis. 126.

(*p*) *Thompson v. Lacy*, 3 B. & A. 283.

(*q*) *Threfall v. Borwick*, L. R. 7 Q. B. 711; 10 Q. B. 210; 41 L. J. Q. B. 266; 44 L. J. Q. B. 87.

(*r*) *Mulliner v. Florence*, 3 Q. B. D. 484.

(*s*) *Sunbolf v. Alford*, 3 M. & W. 248.

(*t*) *Mulliner v. Florence*, *supra*.

(*u*) 41 & 42 Vict. c. 38.

(*x*) *Jones v. Thurloe*, 8 Mod. 173;

Jones v. Pearle, 1 Str. 556, 557.

the others ; so that if the hosteller permit him to take away all but one, he cannot retain that one until the expense of the whole is paid. (*y*) If the guest takes the chattel away without the hosteller's consent, the latter may take it on a fresh pursuit as a distress rescued, if he follow promptly, but not otherwise. (*z*) However long horses may remain at an inn, the relative duties and obligations of innkeeper and guest continue until some fresh contract or arrangement is made. (*a*)

Liability of Lodging-House Keepers. — By the first resolution in Calye's case (*aa*), it was held "that if a man be lodged with another who is not an innholder, if he be robbed in his house by the servants of him who lodged him or any other, he shall not answer for it." But it is the duty of every lodging-house keeper to take such care of his house as every prudent householder might be expected to take, and to be careful in the choice of his servants. If articles belonging to the lodger are actually placed in his hands, he will be responsible, like any other bailee, for the loss of them ; but he is not a bailee of them merely by reason of their having accompanied the person of the lodger and been placed in his house by the latter. The law is that the lodger must take care of his own goods in his lodgings. (*b*)

Gratuitous Loans of Realty. — The gratuitously permitting a person to use a shed, by himself or his servant, for a particular purpose, is a mere revocable license, and has no analogy to a bailment of personal property ; and the only duty imposed on such person is that there shall not be negligence in the use of the shed ; and he is not responsible for the negligence of his servant not within the scope of his employment. (*c*)

(*y*) Moss v. Townsend, 1 Bulstr. 207.

(*z*) Rosse v. Bramsted, 2 Roll. 438.

(*a*) Allen v. Smith, 12 C. B. N. S. 638; 31 Law J. C. P. 306.

(*aa*) Calye's case, 8 Co. Rep. 32 a.

(*b*) Holder v. Soullby, 8 C. B. N. S. 254; 29 Law J. C. P. 246; Dansey v. Richardson, 3 Ell. & Bl. 144; 23 Law J. Q. B. 223.

(*c*) Williams v. Jones, 33 L. J. Ex. 297.

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*SECTION II.

DISTRESS FOR RENT.

Distress for Rent in arrear. — By the common law, as we have seen (*ante*, p. * 233), landlords to whom rent is due, and who are clothed with the immediate reversion of the premises out of which the rent issues, have the power of entering in person, or by deputy, upon the demised premises (*a*), and seizing the movables and personal property thereon, with certain exceptions, and holding them as a pledge for the payment of the rent, and they have now by statute the power of selling the things distrained.

It is essential to the lawful exercise of the power of distress that there be a tenancy (*b*) for a term, or at will, at an ascertained rent (*c*), and that the distrainor be the person entitled to the reversion of the premises distrained upon, on the determination of the existing tenancy. “If he has made a lease without having any right or title to grant a lease, or if, after the making of the lease, he has sold and transferred his estate or interest to some third party, (*e*) or, being himself only a lessee, he has assigned his lease, or if, after granting an under-lease, he has forfeited his estate by some breach of covenant or otherwise, and the superior landlord has entered, and the tenant has attorned to the latter, he has no right or power to distrain. (*f*) It has been held that a tenant from year to year, underletting from year to year, has a reversion which enables him to distrain for rent reserved upon such under-lease.” (*g*) However, although the

(*a*) See *Selby v. Greaves*, L. R. 3 C. P. 594.

(*b*) See *Clowes v. Hughes*, L. R. 5 Exch. 160, in which case the distress was made by a mortgagee upon the mortgaged lands under an agreement contained in the mortgage deed.

(*c*) *Anderson v. Mid. Ry. Co.*, 30 Law J. Q. B. 94; *Howe v. Scarrott*, 28 Law J. Exch. 325; *Jolly v. Arbuthnot*, 28 Law J. Ch. 547; *Addison on Contracts*, p. 316, 6th ed.

(*e*) *Parmenter v. Webber*, 8 Taunt. 593; 2 Moore, 656; *Preece v. Corrie*, 2 M. & P. 64; 5 Bing. 24; 5 M. & Ry. 157, 162; *Smith v. Mapleback*, 1 T. R. 441.

(*f*) *Burne v. Richardson*, 4 Taunt. 720; *Hopcroft v. Keys*, 2 M. & Sc. 760; 9 Bing. 613; *Langford v. Selmes*, 3 K. & J. 229.

(*g*) *Curtis v. Wheeler*, M. & M. 493.

distrainor be not entitled to the immediate reversion, the distrainee may be estopped from denying that he is entitled to it. (*h*)

If the lease has been put an end to by a surrender of the term or by a notice to quit, and the tenant, notwithstanding the termination of the demise, continues to hold, with the permission of the landlord, as tenant-at-will, or adversely and against the will of the lord as a wrong-doer, the lessor has no power at common law to *distrain the goods and chattels of [*307] the tenant for rent in respect of such occupation. (*i*) Neither can he distrain, except under the statute of Anne (*post*, p. * 310), for rent that accrued due before the determination of the lease. But any slight evidence of a renewal of the tenancy, and of an agreement to hold upon the former terms, would be sufficient to justify the landlord in distraining for the old rent. (*k*) A distress affirms the tenancy up to the day when the rent became due. (*kk*)

If the tenant becomes bankrupt or files a petition for liquidation by arrangement, the landlord or other person to whom any rent is due may still distrain; but if the distress be levied after the commencement of the bankruptcy, it is not available for more than one year's rent accrued due prior to the date of the order of adjudication. (*l*) *A fortiori*, therefore, if the trustee in bankruptcy declines to take the lease, the lessor is not, in case the bankrupt tenant continues to hold the property, deprived by the bankruptcy of his right to distrain. (*m*) Nor is he so deprived if the creditors determine to accept a composition under sect. 126, and the bankrupt tenant remains in possession. (*n*) If a lessee, having granted an under-lease, becomes bankrupt, such bankrupt lessee is not deprived by the bankruptcy of his right to distrain, unless the assignees have taken to the lease and discharged the

(*h*) *Morton v. Woods*, L. R. 3 Q. B. 658; 4 ib. 293; 28 Law J. Q. B. 81.

(*i*) *Jenner v. Clegg*, 1 M. & Rob. 213; *Alford v. Vickery*, 1 Car. & Marsh. 283; *Phené v. Popplewell*, 12 C. B. N. S. 334; 31 Law J. C. P. 235.

(*k*) *Zouch v. Willingale*, 1 H. Bl. 311; *Beavan v. Delahay*, 1 H. Bl. 8.

(*kk*) *Cottesworth v. Spokes*, 10 C. B. N. S. 103; 30 L. J. C. P. 220.

(*l*) 32 & 33 Vict. c. 71, sect. 84; *Ex parte Birm. & Staff. Gas Light Co.*, L. R. 11 Eq. Ca. 615; see *Re Lundy Granite Co.*, *post*, p. * 320.

(*m*) *Briggs v. Sowry*, 8 M. & W. 729; *Newton v. Scott*, 10 M. & W. 471; *Phillips v. Shervill*, 6 Q. B. 944; 14 Law J. Q. B. 144; see 32 & 33 Vict. c. 71, sect. 23.

(*n*) *Ex parte Birm. Gas Light Co.*, L. R. 11 Eq. Ca. 204.

bankrupt from the rent payable to the superior landlord. (*o*) The power of distress is always subservient to prerogative process issued by the crown, such as an extent; and the sheriff may consequently take goods that have been distrained out of the hands of the landlord or his bailiff, and sell them for the benefit of the crown. (*p*) A landlord, moreover, cannot distrain twice for the same rent, unless the distress has been withdrawn at the instance or request of the tenant, or unless there has been some mistake as to the value of the things taken. It is vexatious and actionable in a landlord to make repeated distresses unnecessarily. (*q*)

When there is no Certain Ascertained Rent, there is no Right to distrain. — If lands and houses have been demised together at one *entire rent, and the lease is void as to part of the subject-matter of the demise and good for the residue, the lessor cannot distrain for the rent, as there is no distinct and ascertained rent fixed in respect of the part for which the lease is good. (*r*) Where there was a lease of one hundred acres of land at an annual rent of £79, and eight of these acres were in the possession of another tenant under a prior demise, it was held that the lessor could not distrain for any part of the rent, as it was reserved in respect of the whole one hundred acres, and the rent was entire and unapportionable. (*s*) But where a new agreement is come to, providing for a specified reduction of rent, or for an ascertained and settled compensation in respect of the part held under the prior demise, such agreement may operate as a re-demise at an ascertained rent, recoverable by distress. (*t*)

Where an oral agreement was entered into between the proprietor of a marl-pit and brick-mine, and a potter and brick-maker, upon the terms that the latter should pay 8*d.* per solid yard for all the marl that he got out of the marl-pit, and 1*s.* 8*d.*

(*o*) *Peskett v. Somers*, coram Wilde, C. J., Sittings after Hil. Term, 1850; but see 32 & 33 Vict. c. 71, sect. 23.

(*p*) *Rex v. Cotton, Parker*, 112; and see 32 & 33 Vict. c. 14, sect. 31, as to a distress at suit of the crown on property of bankrupt for duties, &c. under that act.

(*q*) *Bagge v. Mawby*, 8 Exch. 649; *Dawson v. Cropp*, 1 C. B. 961.

(*r*) *Gardiner v. Williamson*, 2 B. & Ad. 339.

(*s*) *Neale v. Mackenzie*, 1 M. & W. 763.

(*t*) *Watson v. Wand*, 8 Exch. 335.

per thousand for all the bricks that he made from the brick-mine, by quarterly payments at the usual quarter-days, and the brickmaker took possession of the pit and mine, and dug marl and burnt bricks, and made several quarterly payments, it was held that this was a demise from year to year at a rent capable of being ascertained with certainty, and that the lessor, therefore, was entitled to distrain. (*u*) And where land was held upon the terms that the plaintiff should not sell hay off the demised premises under a penalty of 2*s.* 6*d.* a yard, to be recovered by distress as for rent in arrear, it was held that the penalty might be treated as a rent payable in respect of every sale made in breach of the agreement, that the amount due was capable of being ascertained with certainty, and might be recovered by distress. (*x*)

If a tenant has entered into possession under an agreement which does not operate as a present demise at a fixed rent, but merely as an executory contract for a future lease afterward to be granted, and the landlord neglects to grant the lease, and the tenant continues to occupy without paying any rent or making any absolute and unconditional admission of any specific sum being due as rent in respect of such occupation, the landlord has no right to distrain. (*y*) But whenever there is an agreement for a tenancy at a fixed rent, though it be a tenancy-at-will only, (*z*) or * whenever by payment of rent, or [*309] otherwise, any tenancy at a fixed rent can be implied, the landlord may distrain for all rent subsequently accruing due. (*a*) And if the tenant, after he has taken possession, "promises to pay a rent certain, or settles it in account, the landlord will then have a right to distrain." (*b*) So if a man, on being let into possession under an agreement for purchase, signs an agreement admitting that he is tenant at a certain rent, he may be distrained upon. (*c*)

By the 14 & 15 Vict. c. 25, sect. 1, it is provided that where the lease of any farm or lands shall determine by the death or

(*u*) *Daniel v. Gracie*, 6 Q. B. 145.

(*x*) *Pollitt v. Forest*, 11 Q. B. 949;
16 Law J. Q. B. 424.

(*y*) *Hegan v. Johnson*, 2 Taunt. 148.

(*z*) *Anderson v. Mid. Ry. Co.*, 30
Law J. Q. B. 96.

(*a*) *M'Leish v. Tate*, Cowp. 783.

(*b*) *Knight v. Bennett*, 11 Moore,
222; 3 Bing. 361; *Cox v. Bent*, 2 M. &
P. 281; 5 Bing. 185.

(*c*) *Yeoman v. Ellison*, L. R. 2 C. P.
681; see *Morton v. Woods*, *ante*, p. *306.

cessor of the estate of a landlord entitled for life or for some uncertain interest, instead of a claim to emblements, the tenant shall continue to hold till the expiration of the then current year, and shall then quit as if his lease had expired by effluxion of time, and the succeeding landlord shall be entitled "to recover and receive of the tenant" a fair proportion of the rent for the period since the lessor's death. The above act applies to all tenancies in respect of which there exists a valid claim to emblements, and confers a right to distrain for the rent as well as to recover it by action. (*d*)

Of Conditions precedent to the Right to Distrain. — The right to distrain may be made conditional, or may be postponed by the contract of the parties. (*e*) Where a lessee agreed to take, and the lessor to let, a house and premises at a yearly rent, payable quarterly, and the lessor agreed to complete the house and fix a bresummer in the window, and allow the lessee £15 towards erecting an oven, and the lessee took possession and built the oven, but the lessor never completed the house nor fixed the bresummer, and the lessee refused payment of the rent, whereupon the lessor distrained, it was held that the distress was illegal, as the condition upon which the rent was to become due remained unaccomplished. (*f*) And where an oral agreement was entered into for the letting and hiring of a house and furniture at an annual rent, payable quarterly, the house to be furnished completely, in a manner suitable to a ladies' school, and the lessee took possession, it was held that the furnishing of the house by the lessor in the manner agreed upon was a condition precedent to his right to distrain for the rent. (*g*) Whenever a covenant or promise to pay rent is conditional and dependent, and the lessor is ready and willing to fulfil the condition on his part, but the lessee prevents him, the lessor will have his power of distress.

[*310] *** Distress for Rent payable in Advance (*h*) — Rent when due — Several Demises.** — Rent may be made

(*d*) *Haines v. Welsh*, L. R. 4 C. P. 91; see 33 & 34 Vict. c. 35, "The Apportionment Act, 1870."

(*e*) *Giles v. Spencer*, 3 C. B. N. s. 253; 26 Law J. C. P. 237.

(*f*) *Regnart v. Porter*, 5 M. & P. 370.

(*g*) *Meehelen v. Wallace*, 7 Ad. & E. 54, n.

(*h*) See *De Nicholls v. Saunders*, *post*, p. * 312.

payable in advance, so as to entitle the landlord to distrain for it at the commencement instead of at the end of each quarter. (*i*) When there is a reservation of an annual rent, or a covenant or agreement by a tenant to pay so much a year, a stipulation for the determination of the tenancy at the expiration of any one quarter of a year, by a six or three months' notice, will not raise a presumption that the rent was to be paid quarterly. (*k*) Where a landlord agreed to let a house at a yearly rent of £50, and likewise the stable and loft at a further rental of £25 per annum, to be paid on the usual quarter-days, it was held that this was a demise of two different sets of premises at separate rents, payable at different periods; that the £50 rent was payable yearly, and the £25 rent payable quarterly. (*l*) Where a contract was entered into for the letting and hiring of a house for a year certain, at a rent payable quarterly, "or half-quarterly if required," and the tenant entered into possession and paid his rent quarterly for the first year of the tenancy, at the expiration of which period the lessor, without any previous demand or notice to the tenant, distrained for half a quarter's rent then alleged to be due, it was held that the lessor had no right so to do without giving a previous intimation and notice to the tenant of his election to take the rent half-quarterly. (*m*)

If the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and after a seizure has been made, he may rescue his goods at any time before they have been impounded; but when once the goods have been impounded, they are in the custody of the law, and the tenant cannot then break the pound and retake them. (*n*)

Distress after the Termination of the Term of Hiring. — At common law the landlord could not, it seems, have distrained after the expiration of the term for rent that accrued due before the termination thereof, as his reversion was then gone, the entire estate being revested in him in possession; (*o*) but now, by

(*i*) *Lee v. Smith*, 9 Exch. 665.

(*k*) *Collett v. Curling*, 10 Q. B. 785;
16 Law J. Q. B. 390.

(*l*) *Coomber v. Howard*, 1 C. B.
440.

(*m*) *Mallam v. Arden*, 3 M. & Sc.

795; 10 Bing. 299.

(*n*) 1 Inst. 47 b, 161 a; Gilbert on
Distress, 61.

(*o*) *Williams v. Stiven*, 9 Q. B. 14;
15 Law J. Q. B. 321.

8 Anne, c. 14, sects. 6, 7, it is enacted that it shall be lawful for him to distrain for arrears of rent due upon any lease ended or determined after the determination of the lease, in the same manner as he might have done if such lease had not been ended or determined; provided such distress be made within six calendar months after the determination of the lease, and [*311] during the continuance of the *landlord's title or interest, and during the possession of the tenant from whom such arrears became due. *Prima facie*, therefore, the executors or other personal representatives of a tenant could not be distrained upon. But the Court of Queen's Bench has held a distress to be good during the possession of the executors, when the tenancy was not determined by the death of the tenant. (*p*) Where, however, there is no possession by any one who can be said to be the representative of the tenant, and the tenancy is determined by the death of the tenant, the statute of Anne does not apply, and there is no power to distrain. (*q*) Where a tenant went away, leaving behind him a cow and a few pigs, without asking permission to leave them, or saying when he was going to take them away, and the succeeding tenant entered and took possession, it was held that the lessor had no right to distrain the things so left, as the tenant was not then in the possession and occupation of the premises. (*r*) The customary right of the tenant to an away-going crop always operates as a prolongation of the term as to the land on which the crop grows for the period allowed by the custom for getting in and gathering the crop. All the rights and properties belonging to the original contract are continued during the period in question, and among them the landlord's right to distrain. Therefore where a part of the tenant's corn remained in a barn on the demised premises beyond the period of six calendar months, but within the term allowed by custom for the outgoing tenant to get in and dispose of his crop, it was held that the corn might be distrained by the landlord. (*s*)

(*p*) Braithwaite v. Cooksey, 1 H. Bl. 465.

(*q*) Turner v. Barnes, 31 Law J. Q. B. 170; see 33 & 34 Vict. c. 35.

(*r*) Taylerson v. Peters, 7 Ad. & E. 110; 2 N. & P. 622.

(*s*) Beavan v. Delahay, 1 H. Bl. 9; Lewis v. Harris, ib. 7, n. (a); Nuttall v. Staunton, 4 B. & C. 51.

If, by the tacit consent of the landlord and tenant, the contract between them continues beyond the time for which they originally contracted, all the rights and properties belonging to the original contract are also continued, and among them the landlord's right to distrain. It has often been determined that if there be a lease, and after the determination of it the tenant holds over with the consent of the landlord, he must hold upon the terms, and is liable to all the conditions and covenants of the lease. (*t*) If after the determination of a tenancy by the expiration of a notice to quit, the tenant holds over and the landlord distrains for rent, the landlord thereby waives the notice, and affirms and continues the tenancy. (*u*)

Distress by Agents — Joint Tenants — Tenants in Common, &c. — * A mere receiver of rents (not being a [*312] receiver appointed by the Court of Chancery) has no power to distrain, although he may be authorized to collect and receive the rents for his own benefit. (*x*) And when an agent or bailiff receives a special authority from the lessor to levy a distress upon the demised premises, the authority should be given and acted upon in the name of the lessor or reversioner. But if the agent distrains in his own name, and gives a notice in writing stating the rent to be due to himself, he may nevertheless justify in the name and as the bailiff of the lessor. A person beneficially interested in the demised premises may use the name of the owner of the legal estate to levy a distress. The cestui que trust, therefore, may distrain in the name of the trustee, and a mortgagor, in certain cases, in the name of the mortgagee. (*y*) A receiver appointed by the Court of Chancery has a power of distress, and need not previously apply to the court for a particular order for that purpose. (*z*) One joint-owner or joint-reversioner may distrain alone, but he must, it seems, avow and justify the taking of the distress in his own right, and as bailiff to the other. (*a*) He may also sign a warrant of distress,

(*t*) *Beavan v. Delahay*, 1 H. Bl. 9; *Law J. Exch.* 320; *Snell v. Finch*, 32 *Law J. C. P.* 177; 13 C. B. N. s. 651.

(*u*) *Zouch v. Willingale*, 1 H. Bl. 311.

(*x*) *Ward v. Shew*, 2 M. & Sc. 756; 9 Bing. 608.

(*y*) *Trent v. Hunt*, 9 Exch. 14; 22

(*z*) *Brandon v. Brandon*, 5 Madd. 473; *Bennett v. Robins*, 5 C. & P. 379.

(*a*) *Pullen v. Palmer*, 5 Mod. 73, 150; 3 Salk. 207.

and appoint a bailiff to distrain for rent due to all, unless the others expressly dissent. (*b*) The same rule prevails in the case of co-parceners and co-heirs in gavelkind, any one of whom may avow and justify the distress in his own right, and make conscience as the bailiff of the others without averring or showing any express authority from them to distrain. (*c*) If one of several joint tenants of the reversion to which the rent is incident conveys away all his estate and interest in the demised premises, the right to distrain for the rent is extinguished, for there can be no apportionment of the rent by the severance of the reversion. (*d*) The payment of rent in advance to a landlord mortgagor, unless by agreement the tenant is bound to do it, is not valid as against mortgagees, who may consequently distrain for it. (*e*)

Tenants in common who have several estates, and are severally entitled to the rent and the reversion of the demised premises, should make several distresses. They may, of course, authorize a bailiff to distrain on behalf of all, or one tenant in common may distrain on his own account, and as the bailiff and agent of others; but they must avow and justify the [*313] taking of the distress separately* in respect of their several shares. (*f*) And one tenant in common may distrain for his own share of the rent, although the rent has been reserved in one sum payable to all generally, and not in several sums payable to each; and, therefore, where a lessee holding under two tenants in common, at a yearly rent of £18, payable quarterly, received notice from one of them to pay to him a moiety of the rent as soon as it became due, and the lessee, notwithstanding such notice, paid the whole rent to the other tenant in common, it was held that the one who had thus given the notice might distrain upon the land for his moiety of the rent. (*g*) Where fifty acres of arable land were demised by four persons (whose original title did not appear) at one entire rent of £94 per annum, to be divided and paid to the

(*b*) *Robinson v. Hoffman*, 1 M. & P. 474; 4 Bing. 562; 3 C. & P. 234.

(*c*) *Leigh v. Shepherd*, 5 Moore, 297; 132 B. & B. 465.

(*d*) *Staveley v. Allcock*, 16 Q. B. 636; 20 Law J. Q. B. 321.

(*e*) *De Nicholls v. Saunders*, L. R. 5 C. P. 589; *Cook v. Guerra*, L. R. 7 C. P.

(*f*) Litt. sects. 314–317.

(*g*) *Harrison v. Barnby*, 5 T. R. 246.

four lessors separately in equal portions, it was held that as between themselves and the lessee they must be taken to be tenants in common of the reversion, and that one of the four was entitled to distrain for a fourth part of the rent independently of the rest. (*h*)

Distress by Executors and Administrators.—By 3 & 4 Wm. IV., c. 42, sects. 37, 38, the executors and administrators of a lessor or landlord may distrain upon lands demised for any term or at will, for arrearages of rent due to such lessor or landlord in his lifetime.

Agreements not to distrain.—The right to distrain may be waived, abandoned, or postponed by the express contract or agreement of the landlord, for it is not an inseparable incident to a rent service. (*i*) If, therefore, a landlord has agreed with the owner of cattle not to distrain them if they are put into a particular close, and they are afterward distrained there by the landlord in violation of his agreement, an action for a trespass in taking the cattle is maintainable against him. (*k*)

Acceptance of a Bill or Note by Way of Payment.—A landlord is not deprived of his right to distrain by taking a bill, or note, or other security for the rent, unless it be proved that the landlord, at the time he accepted the security, bound himself not to distrain, (*l*) or unless it be proved that the note was paid at maturity. (*m*) If the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and pays over the amount of the note to the landlord, and the note is subsequently dishonored, the landlord may return the money to the bailiff or * treat [*314] it as an advance or loan from him, and distrain again for the unpaid rent. (*n*)

Tender of Rent before Distress renders the distress wrongful *ab initio*. If, therefore, after a broker has received a warrant of

(*h*) *Whitley v. Roberts*, McL. & Y. 107.

(*i*) *Giles v. Spencer*, 3 C. B. N. S. 244; 26 Law J. C. P. 237.

(*k*) *Horsford v. Webster*, 1 C. M. & R. 699; *Welsh v. Rose*, 6 Bing. 638; 4 M. & P. 490.

(*l*) *Davis v. Gyde*, 2 Ad. & E. 626; see *Bramwell v. Eglinton*, 33 Law J. Q. B. 130.

(*m*) *Harris v. Shipway*, Bull, N. P. 182 a.

(*n*) *Parrott v. Anderson*, 7 Exch. 93; 21 Law J. Exch. 291.

distress, but, before it is executed, the rent is tendered, the right to distrain is gone. (*o*)

Time, Mode, and Place of Distraing.—The tenant has the whole day on which the rent becomes due to pay such rent, and a distress, therefore, cannot be made until the day after the day appointed for the payment of the rent. (*p*) A landlord or his bailiff cannot lawfully break open gates, or break down inclosures, or force open the outer door of any dwelling-house or building (*q*), or even enter by a window which is shut but not fastened, (*r*) in order to make a distress; but he may enter by a door which is shut but not fastened, for that is the ordinary method of entry, and a person who leaves his door unfastened implies a license to any one who has business to enter the premises; and so he may draw a staple or undo fastenings which are ordinarily opened from the outside of the house, (*s*) or perhaps enter by an open window. (*t*) A distress, moreover, cannot be made after sunset, or before sunrise (*u*); nor upon land which does not form part or parcel of the demise, and from which the rent reserved does not issue, unless the goods of the tenant have been removed thereto from the demised premises within sight of the lord coming to distrain, or unless they have been fraudulently removed thereto by the tenant to avoid the distress. If, therefore, a tenant enjoys an easement over, or a right to use, the land of a third person, and has, in the *bona fide* exercise of such right, placed his goods and chattels on the land of such third person, the lessor has no right to distrain them there. Thus, where a wharf on the banks of a tidal river was demised to a tenant at an annual rent, with a right to use part of the bed of the river, between high and low water mark, as a place of deposit for boats and barges resorting to the wharf, it was held that the lessor of the wharf had no right to distrain the barges of the tenant lying on such land and bed of the river alongside

(*o*) *Bennett v. Bayes*, 5 H. & N. 391; 29 Law J. Exch. 224.

(*p*) 21 Hen. VI., 40; *Duppa v. Mayo*, 1 Saund. 287.

(*q*) *Brown v. Glenn*, 16 Q. B. 254; 20 Law J. Q. B. 205.

(*r*) *Nash v. Lucas*, L. R. 2 Q. B. 590.

(*s*) *Ryan v. Shilcock*, 7 Exch. 72; 21 Law J. Exch. 55.

(*t*) *Nixon v. Freeman*, 5 H. & N. 647.

(*u*) *Co. Litt.* 142 a; *Gilbert on Distress*, 50; *Tutton v. Darke*, 5 H. & N. 654; 29 Law J. Exch. 271.

the wharf, although they were attached to the wharf by head and stern ropes, inasmuch as the land on which the barges were lying belonged to the crown, and had never been demised to the *tenant. (x) For the same reason a [*315] landlord could not, by the common law, distrain the beasts and cattle of a tenant feeding upon a common, and which had been placed there by the tenant in the *bona fide* exercise of a right of common vested in him in his own right, or as appurtenant to the land demised to him by the lessor. But this has been altered by 11 Geo. II. c. 19, sect. 8, which empowers landlords to take and seize, as a distress for arrears of rent, any cattle or stock of their tenants feeding or depasturing upon any common appendant or appurtenant. By the terms of the lease, however, a right to distrain upon other lands may be given. (y)

Things not Distrainable.—Tenants' fixtures annexed to the freehold by nails and permanent fastenings, such as furnaces, chimney-pieces, kitchen-ranges, stoves, coppers, grates, blinds, &c., are not distrainable, as they cannot be removed and restored without sustaining some injury. (z) But if they are attached to the freehold by bolts and screws, so as to be movable, they may be distrained and taken. Therefore cotton-spinning machines fixed to a wooden floor by screws, or soldered to a stone flooring, but fastened so as to be readily removable, are distrainable. (a) A millstone in a mill, and an anvil in a smith's shop, however, cannot be distrained for rent, although the anvil be removed out of the stock, or the millstone out of the socket to be picked, for the anvil is accounted part of the forge, and the millstone part of the mill, though when taken it is not actually affixed to the freehold. (b) Tramples and sleepers of a railway merely laid upon the ground, although they have become indented in the soil by user, are distrainable; (c) but if they have been packed

(x) *Buszard v. Capel*, 8 B. & C. 141; 3 M. & P. 494; 6 Bing. 150.

(y) *Daniel v. Stepney*, L. R. 9 Ex. 185, C. A.

(z) *Co. Litt.* 47 b; *Pitt v. Shew*, 4 B. & Ald. 207; *Darby v. Harris*, 1 Q. B. 898; *Dalton v. Whitten*, 3 Q. B. 961.

(a) *Hellawell v. Eastwood*, 6 Exch. 309; 20 Law J. Exch. 155; see *Longbottom v. Berry*, L. R. 5 Q. B. 123; *Holland v. Hodgson*, L. R. 7 C. P. 328.

(b) *Bro. Abr. Distress*, pl. 23.

(c) *Beaufort (Duke of) v. Bates*, 3 De G. F. & J. 381; 31 L. J. Ch. 481.

in ballast, so that they cannot be removed without making holes in the ballast, they are not. (*d*)

By 52 Hen. III. stat. 4, it is provided that no man of religion, nor other person, shall be distrained by his beasts that profit his land, nor by his sheep, by the king's or other bailiffs, so long as they can find other distress, or other chattels sufficient for the levying of the distress. Beasts of the plough are by common law exempt from distress; but to render other animals exempt on the ground that they profit the land, within the above statute, it is not enough to show that they are occasionally used in manuring the soil: it must be proved that they have [*316] been broken to harness, and * are regularly employed in ploughing, harrowing, or drawing carts or wagons upon the farm, in the ordinary cultivation of the land. Heifers and steers, therefore, and young colts not broken to harness are not "beasts that profit the land" within the meaning of the statute. Sheep, also, are exempt from distress at common law, independently of the statute, so long as there are other distrainable chattels and animals, not being beasts of the plough, sufficient to satisfy the rent. (*e*)

Implements of husbandry are also exempt from distress, and so are the tools and instruments of a man's trade or profession, such as the books of the scholar, the axe of the carpenter, the anvil of the smith, the stocking-loom of the weaver, the threshing-machine of the farmer, and the spade and axe of the laborer, so long as they are in actual use, or there are other goods on the demised premises sufficient to satisfy the rent without them. (*f*) Wearing apparel, also, in actual use about the person of the wearer is not distrainable, whether it be the wearing apparel of the tenant himself or of a guest in his house. (*g*)

Perishable Articles, Growing Crops, Fruit, Money, &c. have always been considered to be unfit to be taken and detained as a pledge for rent, inasmuch as they are liable to rapid deterioration, and cannot be restored to the tenant in as good plight as

(*d*) *Turner v. Cameron*, L. R. 5 Q. B. 512; *Wood v. Clarke*, 1 Cr. & J. 484; 306. *Harvey v. Pocock*, 11 M. & W. 740; Co.

(*e*) *Keen v. Priest*, 4 H. & N. 236; 28 Litt. 47 a; *Nargatt v. Nias*, 28 Law J. Q. B. 143.

(*f*) *Simpson v. Hartropp*, Willes, (*g*) Bac. Abr. *Inns* (B).

they were in when taken, within the period allowed by law for their redemption. Therefore fruit, milk, the flesh of animals recently slaughtered, (*h*) and other things of a perishable nature could not be distrained; but as the 2 W. & M. c. 5, sect. 3, directs the distress to be sold within five days unless replevied, perhaps the ancient rule of the common law with respect to the perishable nature of the distress no longer extends, in the case of a distress for rent, to anything which is not liable to deterioration within the period prescribed by the statute for the sale of it. As the things distrained were regarded at common law in the light of a pledge, to be returned to the tenant when the rent was paid, it was held that money could not be distrained unless in a bag, because the identical pieces could not be known and restored; and that grain or flour could not be taken out of a sack, or hay from a barn, because it could not well be ascertained whether the identical quantity taken had been returned. Corn in the sheaf was not distrainable unless found in a cart. Growing corn, grass, fruits, hops, roots, and growing produce, also, were not distrainable, as the crop was * attached to the [* 317] freehold, and could not be taken up and returned to the tenant, in case he chose to redeem the pledge, in the same state and condition as it was in when removed. (*i*) But the 2 W. & M. sess. 1, c. 5, sect. 3, and 11 Geo. II. c. 19, sects. 8 & 9, now enable the lessor to distrain loose corn and corn in the sheaf, straw and hay, growing corn, grass, hops, roots, fruit, pulse, and growing produce generally. These acts, however, do not extend to trees, shrubs, and plants growing in nursery gardens, nor to money. (*k*)

Property of Strangers on the Demised Premises in their own Possession. — The landlord has no right to distrain the carriage and horses of a morning visitor standing at the door of the tenant's dwelling-house, or under a shed upon the demised premises, or the horse of a stranger who has called at the house on business, and tied up the animal to the gate or the stable-door. He cannot distrain a horse which has brought corn to be ground at the tenant's mill, and has been fastened to the mill-

(*h*) *Morley v. Pincombe*, 2 Exch. 101.

(*k*) *Clark v. Gaskarth*, 2 Moore,

(*i*) 1 Roll. Abr. 667; *Bradby on Dis-* 491.

tress, 213; *Gilbert on Distress*, 32.

door whilst the corn was being ground to be taken back, nor a horse which has brought yarn to a private weighing-machine belonging to the tenant to be weighed, and has been placed in a stable on the demised premises whilst the weighing was accomplished; the horse in each of these cases being in the possession and use and under the control of the owner or his servant. (*l*) Neither can the landlord distrain the boat or barge of a third person lying in a private dock or private canal, or alongside a wharf upon the demised premises, provided such boat or barge is in the hands and under the care of the master and crew of the owner, and is at the time employed in the owner's business, and in his use and possession, and not in the use and possession nor under the control of the tenant; but if it is abandoned, and left upon the premises, in the possession or use, or under the care of the tenant or his servants, then it is distrainable. (*m*)

The goods and chattels and wearing apparel of a guest in the tenant's house, in the actual possession and use of such guest, cannot be distrained for rent, whether the house in which the guest is lodged is a private dwelling-house or a common inn; nor the goods and chattels of third persons placed upon the demised premises, in the possession and under the care of the tenant, in the ordinary course of trade; nor the goods and chattels, horses and carriages of travellers deposited in hostelries and public stables, or in a market or fair where things are taken to be bought or sold; nor goods delivered to a carrier to be [** 318*] carried ** for hire*. The horse in the smith's shop shall not be distrained for the rent issuing out of the shop, nor the horse, &c., in the hostelry, nor the materials in the weaver's shop for the making of cloth, or cloth or garments at a tailor's, nor sacks of corn nor meal in a mill, nor in a market, for it is in custody (protection) of law. (*n*)

Property of Strangers placed on the Demised Premises, if placed there with the leave and license of the landlord, is not distrainable. If, for example, the landlord's permission to place cattle on the demised premises has been sought for and obtained,

(*l*) *Read v. Burley*, Cro. Eliz. 596.

(*m*) *Muspratt v. Gregory*, 3 M. & W. 677.

(*n*) 7 Hen. VII., 1 b; Bro. Abr. *Dis-*

tress, pl. 57, 71; 1 Roll. Abr. 688, pl. 12; Co. Litt. 47 a; *Gisbourn v. Hurst*, 1 Salk. 249.

and the beasts are placed thereon with his authority, he is held impliedly to have undertaken not to exercise his power of distress as against them. (*o*) By 34 & 35 Vict. c. 79, if the goods of a lodger are taken as a distress by the superior landlord, the lodger may make and serve upon the landlord or his bailiff a declaration that such is the fact, accompanied by a correct inventory of the goods, and a tender of the rent, if any, which the lodger then owes to the tenant, and if after service of such declaration and inventory the landlord proceeds with the distress, he will be guilty of an illegal distress, and liable to an action at law at the suit of the lodger. The lodger may also apply to a magistrate for an order for the restoration of the goods. "By 35 & 36 Vict. c. 50, the rolling stock of a railway company at any works to which there is a railway siding, which rolling stock is not the property of the tenant of such works, is exempt from distress, if marked with the name or brand, &c. of the actual owner."

Materials placed on the Demised Premises to be manufactured or worked upon.—The goods and chattels of third persons placed on the demised premises for trading or manufacturing purposes are, by the policy of the law, exempt from distress; such as the yarn of a stocking-manufacturer, placed in the house of the tenant, a stocking-weaver, to be woven into stockings, but not the frame or machinery of the manufacturer, delivered to the weaver to enable him to weave the yarn; (*p*) also the silk of a velvet-manufacturer, delivered to a tenant, a silk-weaver, and taken home by him to be made into velvet at his own house; (*q*) bullocks sent to a slaughterer or carcase-butcher, to be slaughtered and cut up in the way of his trade, and sent back in joints to the owner to be sold or consumed; (*r*) corn sent to a miller to be ground; clothes sent to a tailor's, casks sent to a cooper's, or *boats to a boat-builder, to be repaired; [* 319] goods sent to a weigher to be weighed, or to an auctioneer, commission-agent, factor, warehouseman, granary-keeper, wharfinger, or other agent, to be sold or exported, or otherwise to be dealt with in the course of trade. (*s*) And so of goods

(*o*) *Joyce v. Fowkes*, 2 Vern. 129;
Horsford v. Webster, 1 C. M. & R. 696;
Giles v. Spencer, 3 C. B. N. s. 253.

(*q*) *Gibson v. Ireson*, 3 Q. B. 39.

(*r*) *Brown v. Shevill*, 2 Ad. & E. 138.

(*s*) *Bac. Abr. Distress* (B); *Williams v. Holmes*, 8 Exch. 861; *Adams v.*

(*p*) *Wood v. Clarke*, 1 Cr. & J. 484.

in the possession of a pawnbroker as security for money advanced. (*t*) "The principle of the exemption," observes Parke, B., "is the public good; that is, that all men may freely, and without interruption or danger of the loss of their goods, deal with those who carry on trades or businesses for the benefit of all indiscriminately; or buy or sell in markets or fairs, and thus supply themselves with the commodities of life." (*u*) The privilege of goods delivered to an auctioneer is confined to goods on his premises, and does not extend to goods sold on the premises of the owner. (*x*)

Property of Guests at a Common Inn cannot be distrained for the rent of the inn; for it would be a sore detriment to travellers and wayfarers who are obliged by necessity to resort to common inns, if their goods and effects were liable to be seized and sold in case of non-payment of the rent of the inn. (*y*)

Chattels in the Custody of the Law are not distrainable.—Goods and chattels which have been actually seized under a *fi. fa.* or taken under an attachment, and are in the possession of a sheriff's officer or bailiff, cannot be distrained for rent, as they are in the custody of the law; (*z*) but if the landlord is beforehand with the sheriff, and puts in a distress before the sheriff's officer has got possession, the sheriff cannot then seize them. The landlord is entitled to distrain for six years' arrears of rent, (*a*) and if he gets possession before the sheriff, he is entitled to retain and sell, and satisfy the whole six years' arrears if they be due.

If growing crops have been taken in execution and sold by the sheriff, such crops, as long as they remain on the demised premises, are liable to be distrained for rent accruing due subsequently to the execution and sale (14 & 15 Vict. c. 25, sect. 2), in default of sufficient distress of the goods and chattels of the tenant; and if the execution is fraudulent, (*b*) or the sheriff's

Crane, 1 C. & M. 380; Brown v. Arundel, 10 C. B. 54; Gilman v. Elton, 6 Moore, 243; Thompson v. Mashiter, 8 Moore, 254; Matthias v. Mesnard, 2 C. & P. 353; Miles v. Furber, L. R. 8 Q. B. 77.

(*t*) Swire v. Leach, 34 L. J. C. P. 150.

(*u*) Joule v. Jackson, 7 M. & W. 451.

(*v*) Lyons v. Elliot, 1 Q. B. D. 210.

(*y*) Bro. Abr. *Distress*, pl. 57, 71; 1 Roll. Abr. 68, pl. 12.

(*z*) Wharton v. Naylor, 12 Q. B. 673.

(*a*) Humfrey v. Gery, 7 C. B. 567.

(*b*) Smith v. Russell, 3 Taunt. 400;

officer, after the seizure of the goods, relinquishes the possession, and leaves no one in possession of them, then they may be distrained and taken. (c)

* The landlord is entitled in some cases to a year's [* 320] rent, and in other cases to four weeks' arrears of rent, before goods taken in execution by the sheriff or the officers of the county court can be removed from the premises. (d)

Statutory Exemption from Distress in Favor of Foreign Ambassadors and Public Companies in Liquidation. — It is enacted by 7 Anne, c. 12, sect. 3, on grounds of public policy, that process of distress against the goods of any ambassador or other public minister of a foreign state, or of his domestic servants, shall be void.

By the 25 & 26 Vict. c. 89, sect. 163, it is enacted that where any company is being wound up by the court, or subject to the supervision of the court (of Chancery), any attachment, distress, execution, &c., put in force against the estate and effects of the company after the commencement of the winding-up shall be void to all intents. (e) And the 87th section provides that after a winding-up order no suit, action, or other proceeding shall be commenced or proceeded with against the company without the leave of the court. However, if a company, being equitable owner of a lease, continues in occupation after a winding-up order, the landlord is not prevented by sections 87 or 163 of the above act from distraining upon the goods of the company for rent accrued since the winding-up. (f)

Things distrainable. — **Chattels of Traders left on the Demised Premises in the Possession of the Tenant.** — If a trade can be carried on with profit and advantage without the things used in the trade being left on the demised premises in the custody and possession of the tenant, they are not there *ex necessitate*, and are consequently distrainable. Thus it has been held that if a brewer's casks be left with a publican until the beer is consumed,

St. John's College v. Murcott, 7 T. R. 263.

(c) Blades v. Arundale, 1 M. & S. 713.

(d) As to this, and as to distress by bailiffs of the county court, see Add. on Torts, 5th ed. by Cave, p. 639.

(e) See *Re Progress Assurance Co.*, L. R. 9 Eq. Ca. 370.

(f) *Re Lundy Granite Co.*, L. R. 6 Ch. App. 462. Whether the leave of the court is necessary, *quære*; s. c.

the casks do not fall within the exemption, and are not privileged from distress, inasmuch as it is nowise essential to the carrying on the trade of the publican that the brewer should find the casks. (*g*) So if the barge of a purchaser of salt is left at the salt-works in the possession of the vendor of the salt, it is distrainable for rent, inasmuch as "it is not necessary for the protection of trade that the boat should be delivered into the custody of the person manufacturing and selling salt. The trade may well be carried on at the salt-works without the possession of the boat being at all parted with by the owner."

[*321] Upon the same principle it has been * held that a farmer's cart which has brought malt to a brewer, and has been left in the brewer's yard in the possession of the brewer or his servant, to be loaded with a return cargo of grains or beer, is distrainable for the rent of the brewing premises. (*h*)

If a carriage which has been sent to a coach-maker to be repaired is left on the premises after the repairs have been completed, for purposes foreign to the trade of a coach-maker, it is distrainable, unless the coach-maker exercise some other trade thereon, and the carriage is left with him for the purpose of being dealt with by him in the exercise of such trade. If he exercises the trade of a commission agent for the sale of coaches and carriages, as well as the trade of a coach-maker, and the carriage is left with him to be sold, it would then come within the principle of the exemption. (*i*) It has been held that a carriage standing at livery is distrainable. (*k*) Whenever a chattel, such as a threshing-machine or a loom, found upon the demised premises, has been lent or let by the owner to the tenant, it is distrainable if not in actual use at the time of the levying the distress. (*l*) There is a decision to the effect that cattle on their way to market in charge of a drover, and turned into a close on the demised premises in the night, are distrainable; (*m*) but this decision appears to be directly at variance with numerous author-

(*g*) *Joule v. Jackson*, 7 M. & W. 451. 1 W. Bl. 483; *Parsons v. Gingell*, 4 C. B. 545.

(*h*) *Muspratt v. Gregory*, 3 M. & W. 677. (*l*) *Fenton v. Logan*, 3 M. & Sc. 82; *Gorton v. Falkner*, 4 T. R. 565.

(*i*) *Findon v. M'Laren*, 6 Q. B. 891. (*m*) *Fowkes v. Joyce*, 3 Lev. 260; 2

(*k*) *Francis v. Wyatt*, 3 Burr. 1498; Vent. 50.

ities, and with the principles established for the benefit of trade, and cannot now be considered law. (*n*)

With the exception of fixtures, perishable articles, and things used in trade or placed on the demised premises for trading or manufacturing purposes, or standing there in the custody or possession of the owner, as previously mentioned (*ante*, pp. * 315, * 316), all the goods and chattels on the demised premises, whether they belong to the tenant himself or to strangers who have placed them in the custody or possession of the tenant, are distrainable for the rent due from such premises. This is the case with the horses and carriages of strangers standing at livery on the demised premises, and not being at the time of the distress under the charge or in the possession of the owner or his servants. (*o*)

Distress of Chattels mortgaged by the Tenant.—Where a tenant from whom rent was due assigned all his goods and chattels by a registered bill of sale by way of mortgage, and was left in possession of the mortgaged chattels, and the landlord distrained them for *rent, and caused them to be appraised, [*322] and removed to an auction-room to be sold, and the mortgagee, before the sale, and whilst the goods were in the custody of the law, gave notice to the landlord of the mortgage, and required the landlord to deliver to him, the mortgagee, any goods that might remain after the landlord had sold enough to satisfy the distress and costs, and the landlord promised so to do, and part of the goods remained unsold, and the landlord carried them back to the demised premises and returned them to the custody and possession of his tenant, from whom he took them, taking no heed of the notice given him by the mortgagee, or of his promise to return the goods to the latter; it was held that the landlord was not liable to an action at the suit of the mortgagee, as it did not appear that he had been guilty of any tortious act, or that the mortgagee had sustained any damage in respect of the removal of those goods which had been taken away from and returned to the mortgagor, in whose possession the mortgagee had left them, and which were as much subject

(*n*) *Tate v. Glead*, 2 Saund. 290 a; *ber*, L. R. 8 Q. B. 77; 42 L. J. Q. B. see also *per Mellor, J.*, in *Miles v. Fur* 41.

(*o*) *Parsons v. Giggell*, *supra*.

to the provisions of the bill of sale after their return as they had been before they were taken away. (*p*)

If after the tenant has mortgaged the goods and chattels on the demised premises, the mortgagee enters and takes possession, and the tenant becomes bankrupt, owing more than a year's rent, and the landlord distrains, he is entitled to make the distress available for the whole rent due to him, as the Bankrupt Act was never intended to favor the mortgagee at the expense of the landlord. (*q*)

Things distrainable under a License to distrain. — If a debtor gives his creditor a license to enter upon the debtor's land and distrain all the goods and chattels upon the debtor's premises, (*r*) and sell them in satisfaction and discharge of the debt, this will not enable the creditor to seize and sell the property of a stranger, for a license of this sort cannot be made to extend to and to bind those who are not parties to it. (*s*) If, therefore, the occupier of a farm borrows money and binds himself to pay interest, and covenants that if the interest should be in arrear for a certain time the covenantee shall have power to enter upon the farm and distrain for the arrears in the same manner as landlords may distrain for rent, this will be a license to the covenantee to enter and seize all the goods on the premises then belonging [* 323] to the covenantor, but * will not enable him to take the goods of a stranger. (*t*) A license to seize chattels is a mere personal authority, to be exercised by the licensee, and cannot be granted over or assigned to another. (*u*)

The grantee of a rent-charge, with power of distress, may justify the taking corn, &c., in a stack or in trusses, under the 2 Wm. & M. sess. 1, c. 5 (*ante*, p. * 317), in the same way as a landlord under a distress for rent; also the taking of the goods of a stranger on the premises charged with the rent. If the

(*p*) *Evans v. Wright*, 2 H. & N. 527; 27 Law J. Exch. 50.

(*q*) *Brocklehurst v. Lawe*, 7 Ell. & Bl. 185; 26 Law J. Q. B. 107; the 129th section of the old act (12 & 13 Vict. c. 106), under which this case was decided, and the 34th section of the present act (32 & 33 Vict. c. 71) are substantially the same.

(*r*) As to after-acquired property, see *Reeve v. Whitmore*, 32 Law J. Ch. 497.

(*s*) *Howes v. Ball*, 7 B. & C. 481.

(*t*) *Freeman v. Edwards*, 2 Exch. 739.

(*u*) *Brown v. Metrop. County Society*, 1 Ell. & Bl. 838; 28 Law J. Q. B. 236.

plaintiff whose goods have been taken held under a demise prior to the rent-charge, he ought to reply that fact. (*x*)

Distress and Seizure of Things fraudulently removed. — By 11 Geo. II. c. 19, sect. 1, it is enacted that if any tenant of any lands or tenements upon the demise or holding whereof any rent is reserved, shall fraudulently or clandestinely convey away from the demised premises his goods or chattels, to prevent the landlord from distraining for arrears of rent, it shall be lawful for the landlord, or any person by him for that purpose lawfully empowered, within thirty days next ensuing the carrying away of the goods, to seize the same wherever they shall be found, as a distress for the rent, and sell and dispose of them as if they had been actually distrained upon the demised premises, provided (sect. 2) they have not, before the seizure, been sold *bona fide* and for a valuable consideration to a person ignorant of the fraud. Where the goods have been placed in any building or enclosure locked or fastened, the landlord, his bailiff or agent, first calling to his assistance a constable or peace-officer, &c., may in the day-time break open the building and seize the goods; but before breaking open a dwelling-house, oath must be made (sect. 7) before a justice of the peace that there is reasonable ground to suspect that such goods and chattels are in the dwelling-house. (*y*)

If it appears that rent was due at the time of the removal of the goods, and that the goods were taken away on or after the day the rent became due, for the purpose of putting them out of reach of a distress, the removal is a fraudulent removal within the meaning of the statute. (*z*)

If, therefore, goods are removed on quarter-day, they may be followed, though the rent is not in arrear, and there is no right to distrain until the day after. (*a*) But if the rent is not due, or there is sufficient distress on the demised premises, independently, * of the goods removed, to satisfy the rent, [* 324] the removal is not fraudulent, and the lessor cannot consequently follow and distrain the goods. (*b*) The statute

(*x*) *Johnson v. Faulkner*, 2 Q. B. 936; as to a distress for tithe rent-charge, see *Ex parte Arnison*, L. R. 3 Exch. 36.

(*y*) As to pleas of justification of the seizure of goods under this statute, see *Williams v. Roberts*, 7 Exch. 629.

(*z*) *Opperman v. Smith*, 4 D. & R. 33; *Johns v. Jenkins*, 1 Cr. & M. 227.

(*a*) *Dibble v. Bowater*, 2 Ell. & Bl. 564.

(*b*) *Rand v. Vaughan*, 1 Sc. 670.

applies solely to the goods of a tenant, and not to those of a stranger. If, therefore, a lodger removes his goods to prevent them from being distrained for rent due from the tenant whose lodger he is, the landlord cannot follow them and distrain them. (c) To deter tenants from fraudulently removing their goods to avoid a distress, a penalty to the amount of double the value of the things distrained is imposed upon the offender, which may be recovered by an action of debt, or (if the goods do not exceed £50 in value) by a summary proceeding before two justices. (d)

What amounts to a Distress for Rent. — It is not necessary, in order to make a distress for rent, that the lessor or his agent should take corporal possession of the things intended to be distrained. It is sufficient if the lessor, in person or by deputy, enters upon the demised premises and announces to the tenant or his servants, or the persons in actual occupation of the property, that he detains them for his rent. Thus, where a stranger was about to remove some goods he had deposited on the demised premises, and the lessor, hearing of his intention, came upon the land and declared that he would not suffer the things to be removed until his rent was paid, and then went away, and in the course of the day sent a broker who made a formal distress, but in the meantime the stranger had removed his property off the demised premises, it was held that the distress was commenced by the landlord's entry and declaration, and that the landlord was justified in retaking the goods at the place to which they had been removed. (e) So where the landlord's agent entered upon the demised premises in the absence of the tenant, and told the servants of the latter that he was come to distrain for rent, and walked round the premises, took an inventory, and left his inventory at the dwelling-house, with a notice of distress addressed to the tenant, informing him that he had distrained the goods mentioned in the inventory for rent due to his landlord, it was held that the distress was completed and accomplished by these acts of the agent, and that the subsequent departure of the latter,

(c) *Thornton v. Adams*, 5 M. & S. 38.

(e) *Wood v. Nunn*, 2 M. & P. 30; 5

(d) *Horsefall v. Davy*, 1 Stark. 169; Bing. 10; *Cramer v. Mott*, L. R. 5 Q. B. 357.
Bronley v. Holden, M. & M. 175; *Bach v. Meats*, 5 M. & S. 200.

without leaving any one in possession of the things distrained, was not an abandonment of the distress. (*f*) And where the agent of the lessor went into a field forming part of the demised premises, where the tenant's cattle were grazing, and,

* placing his hand upon one of the beasts, declared that [* 325] he distrained the whole of them for the rent then due, it was held that this was an actual levying of a distress on all the cattle in that particular enclosure. (*g*) But a mere notice by a landlord that he has distrained things which are not distrainable, unaccompanied by any seizure or removal of the goods, will not constitute any cause of action. (*h*)

If a warehouse-keeper, who lets out warehouse-room and places of deposit for goods, or receives goods to be warehoused and kept at a certain rent, and has power to distrain the goods in his hands for the warehouse-rent, gives notice to the owner of the goods that he will not deliver certain goods in his warehouse to the order of the latter until the rent due for warehouse room is paid, and then detains the goods, the detainer and notice amount to a distress for the rent. (*i*) Where a lodging-house keeper, to whom rent was due for the hire of furnished apartments, refused to permit the wearing apparel, jewels, and chattels of his tenant to be removed from the apartments, saying that he should detain them until his rent was paid, and the tenant brought an action against him for a conversion of the chattels, it was held that the detainer amounted to a distress for rent, and that the action was not maintainable. (*k*) And where a lodging-house keeper, claiming rent to be due to him from his lodger, locked up the goods of the latter in the room which the lodger held, and in which they had been placed by him, and kept the key in his pocket, refusing the lodger access to them, saying that nothing should be removed until his bill was paid, and the lodger brought an action of trespass for a seizure of the goods, it was held that the action was not maintainable. (*l*)

(*f*) *Swann v. Falmouth (Earl of)*, 8 B. & C. 456; 2 M. & Ry. 534.

(*g*) *Thomas v. Harries*, 1 Sc. N. R. 524.

(*h*) *Beck v. Denbigh*, 29 Law J. C. P. 273.

(*i*) *Green v. St. Kath. Dock Co.*, 19 Law J. Q. B. 53.

(*k*) *Cotton v. Bull*, Easter Term, 1857, C. P.; *Cramer v. Mott*, *ante*, p. * 324.

(*l*) *Hartley v. Moxham*, 3 Q. B. 701.

Abuse of the Right to Distrain, rendering Persons Trespassers

ab initio. — If a landlord going to distrain breaks open an outer door or gets in through a window, and then breaks the door open and seizes the goods in the house, this is not a distress (Add. on Torts (5th ed. by Cave), p. 331), but a trespass, and he is responsible for all the damage sustained by the tenant; (*m*) and if a distress has been lawfully effected in the first instance, but the landlord or his bailiff abuses the distress by using or working horses or animals distrained, he becomes at common law a trespasser *ab initio*; (*n*) but by 11 Geo. II. c. 19, sect. 19,

where any distress shall be made for any rent justly due, [* 326] and any irregularity or unlawful act shall * be afterward done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainor a trespasser *ab initio*; but the party grieved may recover satisfaction for the damage in a special action of trespass or on the case, at the election of the plaintiff, and if he recover he shall have full costs. This statute, however, does not apply where the original entry was unlawful, and no valid distress has been effected. (*o*)

If a distrainor abuses a distress by working an animal distrained, the owner may interfere to prevent it, and an action cannot be maintained against him for pound-breach or rescue. (*p*)

Of Unlawful Distress when no Rent was in arrear. — If the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and after a seizure has been made, he may rescue his goods at any time before they are impounded; but when once the goods have been impounded they are in the custody of the law, and the tenant cannot then break the pound and retake them. (*q*) By the 2 Wm. & M. sess. 1, c. 5, sect. 5, it is enacted that if any person shall distrain for rent pretended to be due or in arrear when no rent was due, the party so distraining shall forfeit double the value of the chattels so distrained and sold, together with full costs of suit.

(*m*) *Attack v. Bramwell*, 32 Law J. Q. B. 148.

(*n*) *Oxley v. Watts*, 1 T. R. 12; Six Carpenters' case, 8 Co. 146 a.

(*o*) *Attack v. Bramwell*, *supra*.

(*p*) *Smith v. Wright*, 6 H. & N. 821; 30 Law J. Exch. 313.

(*q*) *Gilbert on Distress*, 61.

Excessive Distresses. — By the statute of Marlbridge, 52 Hen. III. c. 4, it is enacted that distresses shall be reasonable and not too great; and that he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses. Lord Coke, in his reading on this statute, observes that it is worthy of observation “how provident the makers of the statute be that men’s beasts, cattell, or goods be not excessively distrained,” and that “this agreeth with the reason of the common law.” (*r*) It is the duty, therefore, of every person who has by law a right to distrain, to make a fair and reasonable distress; and if there be a breach of that duty, and the landlord distrains goods and chattels beyond what is reasonably and fairly necessary for the purpose of realizing the rent and expenses, he renders himself liable to an action for damages at the suit of the tenant, even although the tenant has not, in fact, sustained any damage. (*s*) If he distrains the crops growing in two fields, when the crop growing in one would be sufficient, when at maturity, to satisfy the rent and charges, the distress is an excessive distress. (*t*) But it is not for every trifling excess that an action is maintainable; it must be * clearly dispro- [*327] portionate and excessive. (*u*) And “if there is but one thing which can be taken, so that it must be taken or the party must go without his distress, for taking it no action lies, though it much exceeds the sum for which the distress is taken.” (*x*) A distress may be excessive, although the goods when sold may not realize enough to cover the rent due and the expenses. (*y*) The action may be brought by a lodger or under-tenant whose goods have been taken, as well as by the lessee himself; (*z*) and if the lessee, after the distress, enters into an agreement with the landlord respecting the sale and disposition of such distress, or authorizes him to dispense with some or all of the usual forms preparatory to a sale, he does not thereby waive or abandon his right of action for the excessive distress. (*a*) The

(*r*) 2 Inst. c. 4, p. 107.(*y*) *Smith v. Ashforth*, 29 Law J.(*s*) *Chandler v. Doulton*, 34 Law J. Exch. 259.(*z*) *Fisher v. Algar*, 2 C. & P. 374;(*t*) *Piggott v. Birtles*, 1 M. & W. 441. Bail v. Mellor, 19 Law J. Exch. 279.(*u*) *Roden v. Eyton*, 6 C. B. 430.(*a*) *Willoughby v. Marshall*, 4 D. &(*x*) *Field v. Mitchell*, 6 Esp. 71.

R. 53; 2 B. & C. 821.

tenant is entitled to recover damages for a wrongful distress, although he had the free use of the goods all the time they were in the constructive custody of the law. (*b*)

Distress for more Rent than is due.— If a landlord who has distrained, not excessively, for rent in arrear demands a larger sum for arrears than the tenant admits to be due, that alone does not make the detention of the goods by the landlord or his bailiff unlawful. The tenant must be taken to know that neither the validity of the distress nor of the detainer depends on that demand, and that if he wishes to make the latter unlawful he should tender the sum which he alleges to be really due, together with the costs of the distress. (*c*) A declaration, therefore, which alleges that the plaintiff held certain premises as tenant to the defendant at a certain rent, and that the defendant wrongfully seized certain goods of the plaintiff on the demised premises for certain arrears of rent alleged to be due, and afterward sold the goods for the said arrears, whereas a small part only of the rent claimed to be due was due, discloses no cause of action in the absence of an allegation that the defendant sold more than was enough to satisfy the rent actually due and the costs of the distress. (*d*) The distraining of chattels on a claim of more rent being in arrear than is in fact in arrear, and selling them, is not actionable; firstly, because the distrainer for rent is not bound by the amount for which he claims to distrain, and though he takes the distress, alleging that he does so

for an amount exceeding the real arrears of rent, he [*328] may sell afterward only for that which is * really due ;

secondly because, from a mere allegation that the distrainer sold for the alleged arrears and costs, it is not to be inferred that he sold more than was necessary to raise the amount of the arrears actually due. If, however, the untrue claim has been followed by a sale of more of the goods taken than was sufficient to raise the amount of rent really in arrear, with the legal charges, then there is a cause of action. It is not enough in an action against a landlord for distraining for more rent than is really due to allege it to have been done

(*b*) *Baylis v. Usher*, 4 M. & P. 790.

(*d*) *Tancred v. Leyland*, 16 Q. B. 669;

(*c*) *Glynn v. Thomas*, 11 Exch. 870; *French v. Phillips*, 26 Law J. Exch. 82; 25 Law J. Exch. 127.

1 H. & N. 564.

maliciously, for an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. (*e*)

Repeated Distresses for the Same Rent.—A landlord cannot lawfully distrain twice for the same rent, unless the distress has been withdrawn at the instance of the tenant, or unless there has been some mistake as to the value of the things taken, (*f*) or unless the distress has been rendered abortive by the threats or misconduct of the tenant. If after a sale of chattels that have been distrained and sold in due course of law, the tenant by force or threats prevents the purchaser from taking the chattels off the land, the landlord may re-enter and distrain again. (*g*) And if the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and the note is dishonored when it arrives at maturity, the landlord may, as we have seen, distrain again. (*h*)

Impounding the Goods — Pound-breach.—The landlord may now impound the things distrained in any barn or building, hovel or rick, or on any fit part of the demised premises. (*i*) No formal impounding is required, as in ancient times, in order to remove the goods from the possession and control of the tenant, and place them in the custody of the law. As soon as the distrainer has made out and delivered to the tenant, or has left upon the premises, an inventory of the goods he has taken, they are impounded within the meaning of the statute. Thus where the landlord distrained four casks of beer in a cellar, and gave the usual notice of the distress to the tenant, and left the casks where he found them in the cellar, without placing them under lock or key, or leaving any person in charge of them, it was held that the casks were duly impounded. (*k*) So where cattle which had been distrained for rent were left in a field on a farm where they were taken, and the gates of the field, which had been properly secured by the broker who * levied the [*329] distress, were opened, and the beasts taken out and

(*e*) *Stevenson v. Newnham*, 13 C. B. 297; 22 Law J. C. P. 110.

(*f*) *Smith v. Goodwin*, 4 B. & Ad. 13; *Bagge v. Mawby*, 8 Exch. 649; *Dawson v. Cropp*, 1 C. B. 961.

(*g*) *Lee v. Cooke*, 2 H. & N. 584; 3 H. & N. 203; 27 Law J. Exch. 337.

(*h*) *Parrott v. Anderson*, 7 Exch. 93; 21 Law J. Exch. 291.

(*i*) 2 Wm. & M. sess. 1, c. 5, sect. 4; 11 Geo. II. c. 19, sect. 10.

(*k*) *Firth v. Purvis*, 5 T. R. 432.

driven away, it was held that this was a pound-breach, rendering the person who committed the act liable to treble damages under the statute. (*l*) And if the distrainor enters and makes a general announcement of the distress on one day, and follows up the proceeding on the next by giving the tenant notice of the particular things distrained and taken, the impounding is complete, at all events from the time of such notice. (*m*)

Formerly the distrainor, in removing the goods distrained, might have removed them to any place he thought fit for the purpose of impounding them; but the 1 & 2 Ph. & M. c. 12, sect. 1, amending the statute of Marlbridge (*ante*, p. * 326), prohibits the distrainor from driving the distress out of the hundred, rape, wapentake, or lathe in which it has been taken, except it be to a pound overt within the same shire, not above three miles distant from the place where such distress was taken, and enacts that no cattle or goods distrained shall be impounded in several places, whereby the owner shall be constrained to sue several replevies for the delivery of the distress so taken at one time. If the distrainor uses or consumes for his own private use things distrained and impounded, if he draws beer out of a barrel, (*n*) tans hides, or uses or works beasts or cattle, he of course subjects himself to an action for damages at the suit of the owner thereof. (*o*) As soon as the goods are impounded, they are in the custody of the law, and the tenant cannot retake them without being guilty of pound-breach and subjecting himself to an indictment, (*p*) and also to an action for treble damages and costs of suit, although the distress may be wrongful or irregular, and no rent may be in arrear or due. (*q*) But where the distress is being used in a manner which the law will not justify, the owner may interfere to prevent the abuse. (*r*) If the pound is broken and the goods are unlawfully taken away, the landlord may follow them and recapture them; but he must not break open the doors of a private house, or stable, or inclosure, nor

(*l*) *Castleman v. Hicks*, Car. & M. 266.

(*m*) *Thomas v. Harries*, 1 Sc. N. R. 534.

(*n*) *Dod v. Monger*, 6 Mod. 216.

(*o*) *Duncomb v. Reeve*, Cro. Eliz. 783.

(*p*) *Rex v. Bradshaw*, 7 C. & P. 233.

(*q*) 2 Wm. & M. sess. 1, c. 5, sect. 4; 11 Geo. II. c. 19, sect. 10; Co. Litt. 47 b; *Costworth v. Betison*, 1 Ld. Raym. 104.

(*r*) *Smith v. Wright*, 6 H. & N. 821.

enter the grounds of a third person for the purpose of retaking the goods, except it be on fresh pursuit. (*s*)

Penalties are imposed by 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60, on parties neglecting to feed impounded cattle.

If the landlord refrains, at the request of the tenant, from removing the goods from the different rooms in which the landlord * or his bailiff finds them, but takes an [*330] inventory of the goods, puts a man in possession, and hands to the tenant a notice of distress referring to the inventory, this is to all intents and purposes a distraining and impounding of the goods. Each room is, for the convenience of the tenant, and with his assent, converted into a pound for the goods therein. (*t*)

Abandonment of Distress. — Leaving possession of goods distrained is not necessarily an abandonment of the distress. If, therefore, a bailiff or party in possession goes away for a temporary purpose, and is then locked out, he may break open the outer door of the house to recover possession of the distress. (*u*)

Statutory Power of Sale. — The 2 Wm. & M. c. 5, sect. 1, recites that distresses not being to be sold, but only detained as pledges for enforcing the payment of rent, the persons distraining have little benefit thereby, for remedying whereof it is enacted (sect. 2) that where any goods and chattels shall be distrained for any rent reserved or due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods shall not, within five days next after such distress taken, with notice thereof and the cause of such taking left at the chief mansion-house or other most notorious place on the premises charged with the rent, replevy the same with sufficient security, &c., that then, after such distress and notice, and after the expiration of the said five days, the person distraining “shall and may,” with the sheriff or under-sheriff of the county, or with the constable, &c., cause the goods and chattels to be appraised by two sworn (*v*) appraisers, and after such appraisement “shall and may lawfully sell (*x*) the goods so distrained for the best

(*s*) *Rieh v. Woolley*, 5 M. & P. 675; 7 Bing. 651.

(*t*) *Tennant v. Field*, 8 Ell. & Bl. 336; 27 Law J. Q. B. 33.

(*u*) *Bannister v. Hyde*, 29 Law J. Q. B. 141.

(*v*) The appraisers need not be sworn, nor the sheriffs present; see 35 & 36 Vict. c. 92, sect. 13.

(*x*) See *King v. England*, *post*, p. *335.

price (*y*) that can be gotten toward satisfaction of the rent and charges."

Tender of Rent rendering a Sale unlawful.—If after the impounding and before the sale a tender of the rent and expenses is made, the landlord cannot lawfully proceed to sell the things distrained; for it has been held that upon the equity of the above statute, which gives the tenant five days to replevy the things distrained (sect. 2), the tenant ought to have the same time for tendering the rent and expenses, and that an action is maintainable against a landlord who persists in selling after tender of the rent and costs at any time within the five days. (*z*) In the case of a distress of growing crops the tenant may, at any time before the corn is ripe and fit to be cut, tender the [* 331] rent due, and * if after that the landlord takes the corn, he may be proceeded against as a trespasser. (*a*)

Whenever goods have been seized as a distress for rent, and a tender is made of a sum sufficient to cover the rent actually due and the costs of the distress up to the time of the tender, and the bailiff refuses to give up the goods, and the tenant is obliged to pay a larger sum to get back his goods, he is entitled to an action for damages. (*b*) But if the landlord distrains for a larger sum than is due, but not excessively, the tenant should tender the amount really due, if he wishes to make the detention of the goods unlawful. (*c*)

Parties to whom Tender may be made.—A bailiff authorized to distrain for rent has power given him at the same time to receive the rent, and the landlord has no right to circumscribe the bailiff's authority in this respect, for a tenant whose goods are seized under the extraordinary power vested in the landlord of distraining, ought to be enabled in all cases to release them at once by tender of the rent and costs to the bailiff. The power to receive the rent is therefore necessarily annexed to the warrant to distrain; (*d*) but it does not follow that because the

(*y*) See *Hawkins v. Walrond*, 1 C. P. D. 280.

(*z*) *Johnson v. Upham*, 21 Law J. Q. B. 252, overruling, on this point, *Ladd v. Thomas*, 12 Ad. & E. 117, and *Ellis v. Taylor*, 8 M. & W. 415.

(*a*) *Owen v. Legh*, 3 B. & Ald. 473.

(*b*) *Loring v. Warburton*, 28 Law J. Q. B. 31; *Johnson v. Upham*, *supra*.

(*c*) *Glynn v. Thomas*, 11 Exch. 878.

(*d*) *Hatch v. Hale*, 15 Q. B. 15; 19 Law J. Q. B. 289.

tender may be made to the bailiff who distrains, it may be made also to any bailiff's follower who may be put into temporary possession of the goods. (*e*)

Power of Sale of Growing Crops and Things fraudulently removed — Tender before Sale. — The 11 Geo. II. c. 19, which enables landlords to distrain things fraudulently removed from the demised premises, also cattle or stock of their tenants depasturing on commons appurtenant or any ways belonging to the demised premises, and growing crops (*ante*, p. * 317), enacts that it shall be lawful for the landlord in convenient time to appraise, sell, or otherwise dispose of the same toward the satisfaction of the rent and charges, in the same manner as other goods and chattels may be appraised and disposed of, the appraisement to be taken when the crops are cut, gathered, cured, and made, and not before; but it is enacted (sect. 8) that, if after any distress for arrears of rent so taken, and at any time before the crops shall be ripe and cut, cured or gathered, the tenant or lessee, his executors, &c., shall pay to the landlord, or to the steward or other person usually employed to receive the rent, the whole rent then in arrear, with the costs and charges of the distress, then, and upon such payment or lawful tender thereof actually made, whereby the end of such *distress will be fully answered, the same shall cease, [* 332] and the crops and produce distrained shall be delivered up to the tenant.

Notice of Distress is not essential at common law to the validity of the distress. (*f*) It has been expressly laid down that if the lord distrain for rent or services, he has no occasion to give notice to the tenant for what thing he distrains, for the tenant by intendment knows what things are in arrear for his lands as rent and services, &c. (*g*); but the 2 Wm. & M. c. 5, sect. 1, requires, as we have seen (*ante*, p. * 330), notice of the distress to be given preparatory to a sale by the landlord, and the 11 Geo. II. c. 19, authorizing the distress and sale of goods fraudulently removed (*ante*, p. * 323), and of the cattle and stock of tenants depasturing on commons appurtenant or belonging to

(*e*) *Boulton v. Reynolds*, 29 Law J. Q. B. 11.

(*f*) *Trent v. Hunt*, 9 Exch. 20.

(*g*) 1 Roll. Abr. 674, *Distress*, pl. 1; *Tancred v. Leyland*, 16 Q. B. 680.

the demised premises, and growing crops (*ante*, p. *317), requires (sect. 9) notice of the place where the goods and chattels distrained shall be lodged, to be given within one week to the tenant, or left at his last place of abode.

As the tenant is to have five days, under the statute of Wm. & Mary, to replevy from the time he receives notice of the distress, the notice should be given as soon as the distress has been levied. If the distress is not clearly intended to include all the goods and chattels upon the demised premises, the landlord must give the lessee distinct notice of the things included in such distress, in order that he may know what he is to replevy. And for this purpose, as soon as the distress is made, whether by the lessor or his bailiff, an inventory of the goods distrained should be made and served upon the lessee, together with the notice of the distress. The notice of the distress should set forth the amount of rent distrained for, and the particular things taken. (*h*) A written notice of distress is not invalidated by a statement that the rent is due to A, whereas it is due to B, provided B has authorized the distress. (*i*) If the landlord removes and sells goods and chattels which were not included in the inventory and notice, and which have not consequently been comprised in the distress, he is liable to an action for damages at the suit of the tenant. (*k*)

Appraisement and Sale. — If the tenant, after he has received notice of the distress, neglects for five days, to be reckoned exclusively both of the day of distress and of the day of sale, to pay the rent, the lessor or distrainor may cause the goods [* 333] to be *appraised in the mode appointed by the statute (*ante*, p. *330), and may afterward sell them for the best price (see *infra*), that can be got for them, and apply the purchase-money in discharge of the rent and the costs of the sale, (*l*) leaving the surplus, if any, in the hands of the sheriff, under-sheriff, or constable, for the owner's use. The schedule of the 57 Geo. III. c. 93, regulating the costs of appraisements, "whether made

(*h*) *Wakeman v. Lindsey*, 14 Q. B. 625; 19 Law J. Q. B. 166; *Kerby v. Harding*, 6 Exch. 234; 20 Law J. Exch. 163.

(*i*) *Trent v. Hunt*, 9 Exch. 14.

(*k*) *Bishop v. Bryant*, 6 C. & P. 484.

(*l*) *Robinson v. Waddington*, 18 Law J. Q. B. 250. The marginal note of this case, in 13 Q. B. 753, is incorrect.

by one broker or more," refers only to the case of the employment of a single appraiser by consent, and does not dispense with the attendance of the two appraisers. (*m*) If the broker or person actually making the distress on behalf of the landlord constitutes himself one of the appraisers, the appraisement is wrongful and irregular. (*n*) If the tenant holds under a covenant not to carry hay or straw off the demised premises, the landlord who has distrained hay or straw must nevertheless sell it in the ordinary way for the best price. If he sells it subject to a condition that the purchaser shall consume it on the land, he is liable to an action by the tenant for not selling it at the best price. (*o*)

Costs and Expenses. — By 57 Geo. III. c. 93, it is enacted that no persons making any distress for rent under £20 shall take or receive out of the produce of the things distrained and sold any more than the following costs and charges: *i. e.* for levying the distress, 3s.; for the man in possession, 2s. 6d. per day (and even this charge may not under all circumstances be justifiable); (*p*) for the appraisement, 6d. in the pound, and the amount of the stamp; for advertisements, 10s.; for catalogues, sale, and commission, and delivery of goods to the purchaser, 1s. in the pound on the net produce of the sale. If more costs and charges are levied than those allowed by the act, the party aggrieved has a summary remedy before two justices for treble the amount of the charges, or he may bring an action for the recovery of them; but it is provided (sect. 4) that no judgment shall be given against the landlord for such treble costs unless he has personally levied the distress. Every broker or other person who shall make and levy any distress is to give a copy of his charges, and of all the costs and charges of the distress, signed by him, to the person on whose goods and chattels any distress shall have been levied, although the rent demanded may exceed the sum of £20. (*q*) When the rent distrained for exceeds £20, the costs are not limited to any * par- [*334]

(*m*) *Allen v. Flicker*, 10 Ad. & E. 640.

(*n*) *Westwood v. Cowne*, 1 Stark. 172.

(*o*) *Ridgway v. Ld. Stafford*, 6 Exch. 404; 20 Law J. Exch. 226; *Hawkins v. Walrond*, *ante*, p. *330.

(*p*) *Ex parte Arnison*, L. R. 3 Exch. 56.

(*q*) 1 & 2 Ph. & M. c. 12, sect. 2; *Child v. Chamberlain*, 5 B. & Ad. 1049.

ticular amount or fixed scale of charge, but they must be fair and reasonable. (r)

Effect of Non-compliance with the Statutes authorizing the Sale. — The 11 Geo. II. c. 19, sect. 19, after reciting that it has sometimes happened that upon a distress made for rent justly due the directions of the 2 Wm. & M. c. 5, for enabling the sale of goods distrained for rent, have not been strictly pursued, but through the mistake or inadvertency of the landlord or other person entitled to such rent and distraining for the same, or of the bailiff or agent of such landlord or other person, some irregularity or tortious act hath been afterward done in the disposition of the distress so seised or taken, for which the party distraining hath been deemed a trespasser *ab initio*, and in an action brought against him the plaintiff hath recovered the full value of the rent for which the distress was taken, enacts that where any distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterward done by the party distraining or his agents, the distress itself shall not be deemed to be unlawful, nor the parties making it be therefore deemed trespassers *ab initio*, but the party aggrieved by such unlawful act or irregularity may recover full satisfaction for the special damage he shall have sustained thereby, and no more.

The plaintiff, therefore, can only recover for an irregularity in distraining and selling where actual damage is proved. For the original taking there is to be no action; the distrainor is to be considered as being in possession of the goods, notwithstanding a subsequent irregularity. And although he holds the goods with a special authority to deal with them in a particular way, and is liable for abusing that authority, yet the act says that the tenant shall recover full satisfaction for the damage, and no more. Where, therefore, there is no special damage there can be no satisfaction, and a verdict for nominal damages is not sustainable. Where the damages are merely nominal, the defendant is entitled to a verdict. (s) Where, therefore, the plaintiff in his declaration complained of the sale of his goods

(r) *Lyon v. Tomkies*, 1 M. & W. 603.

(s) *Rodgers v. Parker*, 18 C. B. 112; 25 Law J. C. P. 220.

within five days, and proved that they were sold too soon, but there was no evidence to show that he had sustained any damage thereby, it was held that the judge ought to direct a verdict for the defendant. (*t*) But the statute, as we have seen, does not apply to cases where the original entry upon the premises was effected in an unlawful manner, as by breaking open an outer * door, and where, consequently, no valid [* 335] distress has ever been effected. (*u*)

Keeping the Distress without selling. — It has generally been considered that the words in the 2 Wm. & M. c. 5, sect. 2, "shall and may lawfully sell," mean that the landlord must give the statutory notice of the distress, and must proceed to appraise and sell, if the tenant does not replevy within the five days, or desire the landlord not to sell. If, however, the landlord should neglect to give notice of the distress, and to appraise and sell, but should content himself with keeping the goods in his hands, he will not be liable to an action for the detention or conversion of the chattels, unless the tenant can prove that he had gained a right to have the goods delivered up to him, and that he had sustained some special damage by the detention. (*x*) The landlord has a lien for his rent upon the things distrained, and has at common law a right to keep them as a pledge until his rent is paid (*ante*, p. * 306), and he can only be made responsible for not selling in an action founded upon the statute.

The landlord may, with the assent of the tenant, detain the things distrained, or convert them to his own use in satisfaction and discharge of the rent. (*y*) But to obtain a title as against a third person whose goods have been distrained, there must be an actual sale. A taking of the goods by the landlord at the appraised value is not sufficient. (*z*) When a landlord distrains and does not sell, he cannot while he holds the distress bring an action for rent. (*a*)

(*t*) *Lucas v. Tarleton*, 3 H. & N. 116;
27 Law J. Exch. 248.

(*u*) *Attack v. Bramwell*, *ante*, p. * 325. 145.

(*x*) *West v. Nibbs*, 4 C. B. 186;
Glynn v. Thomas, 11 Exch. 870; *Rodgers v. Parker*, *supra*; see *Fell v. Whittaker*, L. R. 7 Q. B. 120.

(*y*) *Jones v. Sawkins*, 5 C. B. 142.

(*z*) *King v. England*, 33 Law J. Q. B.

(*a*) *Lehain v. Philpott*, L. R. 10 Ex.

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Indemnification of Bailiffs. — We have already seen that if a landlord employs a bailiff to make a distress on a tenant for rent alleged to be due from such tenant to the landlord, and it turns out that the landlord had no right to distrain, and the bailiff has to pay damages for the unlawful distress in an action brought against him by such tenant, the bailiff may maintain an action against the landlord for compensation. (*b*)

Action for Damages for Wrongful Distress. — If the landlord has distrained for more rent than is due, and the tenant has tendered the amount due before the distress made, his remedy, if a distress is afterward made, would be either by replevin, or an action for a trespass, or for a wrongful seizure and conversion of the things distrained (*ante*, p. * 326). If the tender is made after the distress, an action would be maintainable for the [* 336] detention of * the property. (*d*) The mere retaining by the landlord of the goods distrained after the tenant has gained a right to have them delivered up to him, will not render the landlord liable to an action for a trespass. A landlord, therefore, who refuses a proper tender is not to be regarded as a trespasser merely by reason of his nonfeasance in failing to deliver up the distress on being required so to do, but his refusal may amount to evidence of a conversion. (*e*)

If a landlord makes a second distress for the same rent when he might have taken sufficient at first, he is liable to an action for the wrongful conversion of the things seized under the second distress. (*f*)

The wrongful seizure of beasts of the plough or of the tools and implements of a man's trade may be made the foundation of an action of trespass as well as of an action upon the case. (*g*)

An action for an excessive distress may be brought by a lodger or under-tenant whose goods have been taken, as well as by the

(*b*) *Rawlings v. Bell*, 1 C. B. 959; (*e*) *West v. Nibbs*, 4 C. B. 172.
Ibbett v. De La Salle, 6 H. & N. 237; (*f*) *Dawson v. Cropp*, 1 C. B. 961.
 30 Law J. Exch. 44. (*g*) *Nargett v. Nias*, 1 El. & El. 439;
 (*d*) *Gulliver v. Cosens*, 1 C. B. 788; 23 L. J. Q. B. 143.
Glynn v. Thomas, 11 Exch. 878; *ante*,
 p. * 33.

lessee himself. (*h*) Where the plaintiff was tenant of a house in which were goods that had been assigned to his wife's trustee, who lived with them, but the plaintiff had the actual use and enjoyment of the goods, it was held he had sufficient special property in the goods to entitle him to maintain an action for an excessive distress. (*i*)

Parties to be made Defendants. — Where a landlord authorized his bailiff to distrain for rent due to him from his farm tenant, and the bailiff by mistake distrained the cattle of another person beyond the boundary of the farm, and sold them, and paid over the money he received for them to the landlord, it was held that the landlord was not responsible for the trespass, unless he received the money knowing of the wrongful seizure, or unless he meant to adopt the act of the bailiff at all hazards. (*k*) But if the landlord has appointed an inexperienced, insolvent, or incompetent bailiff, or has neglected to furnish him with proper instructions, he will be responsible in damages in an action for negligence. And every landlord who gives a broker a general authority to distrain is responsible if his broker exceeds his authority by distraining things which are not distrainable, (*l*) or if he sells goods without having them duly appraised; (*m*) but a landlord who *does not personally [* 337] interfere in making a distress is not liable for the neglect of the broker in not delivering a copy of his charges, &c., pursuant to the statute (*n*) (*ante*, p. * 333).

All persons who aid, or counsel, or direct, or join in a trespass are joint trespassers; but one partner cannot drag another into a trespass without his previous consent, or without his subsequent concurrence. Where, therefore, one of several partners signed a distress-warrant in his own name on behalf of the firm, it was held that this was no proof that the distress was authorized by the firm, so as to render the other partners responsible

(*h*) *Fisher v. Algar*, 2 C. & P. 374;

Bail v. Mellor, 19 Law J. Exch. 279.

And see further as to actions for the unlawful seizure and conversion and unlawful detention of chattels, Add. on Torts (5th ed. by Cave), pp. 458-463.

(*i*) *Fell v. Whittaker*, L. R. 7 Q. B. 120.

(*k*) *Lewis v. Read*, 13 M. & W. 837; *Freeman v. Rosher*, 13 Q. B. 780.

(*l*) *Gauntlett v. King*, 3 C. B. N. S. 59.

(*m*) *Haseler v. Lemoyne*, 5 C. B. N. S. 530.

(*n*) *Hart v. Leach*, 1 M. & W. 560.

for it. It must be shown, either by evidence before the transaction that they all joined in ordering the distress, or by evidence afterward that they concurred in and received the benefit of it. (*o*)

A cognizance by a defendant, as bailiff of an executor, for rent due to the testator is supported by proof of a distress by him in the name of the testator, and by his direction, but after his death, such distress, though made before probate, having been afterward adopted and ratified by the executor. (*p*)

Avowries by Joint Tenants, Coparceners, and Tenants in Common.—If the distress is made by a bailiff or agent on behalf of all, all must join in the avowry and conusance. (*q*) Tenants in common, on the other hand, must avow the taking of the distress in respect of their several shares. Thus, if three tenants in common distrain thirty beasts, one of them must avow for ten, the other for ten, and the third for ten more. (*r*) But one of several tenants in common may, as we have seen, distrain and avow for his own share of the rent (*ante*, p. * 312).

The plea of *riens in arriere* simply alleges that no part of the rent alleged in the avowry to be in arrear was in arrear. Under this plea, payments made to a ground landlord or other incumbrancer having claims paramount to the claim of the immediate landlord making the distress may be given in evidence in reduction of the rent, as such payments are always presumed to be authorized by the landlord, he being obliged to protect the tenant from them, and are treated as payments of rent by the tenant. (*s*) But payments which are not a direct charge upon the demised premises cannot be given in evidence in satisfaction and discharge of the rent, unless they were directed or sanctioned by [** 338*] the landlord. (*t*) * The meaning of the plea of *riens in arriere* is that the plaintiff, at the time of the distress, was in arrear to nobody; and if he has not paid anybody, he

(*o*) *Petrie v. Lamont*, Car. & M. 96.
(*p*) *Whitehead v. Taylor*, 10 Ad. & E. 210.

(*q*) *Stedman v. Bates*, 1 Salk. 389.

(*r*) Litt. sects. 314–317; *Philpott v. Dobbinson*, 3 M. & P. 320.

(*s*) *Jones v. Morris*, 3 Exch. 746. As

to payments under the Metropolis Management Amendment Act, 1862, 25 & 26 Vict. c. 102, sect. 96, see *Ryan v. Thompson*, L. R. 3 C. P. 144.

(*t*) *Davies v. Stacey*, 12 Ad. & E. 511.

cannot, under this plea, contest the defendant's right to the rent. (*u*)

Of the Plea of Not Guilty "by Statute" in Actions of Trespass or upon the Case for an Unlawful Distress.— By the 11 Geo. II. c. 19, sect. 21, it is enacted that in all actions of trespass or upon the case against persons entitled to rents or services, their bailiffs or other persons, relating to any entry upon premises chargeable with such rents or services, or to any distress or seizure thereupon, it shall be lawful for the defendants to plead the general issue and give the special matter in evidence, inserting in the margin of the plea the words "by statute." (*x*) Under the plea of not guilty "by statute," therefore, the defendant may give in evidence that he entered the plaintiff's house under a warrant of distress for rent, and was forcibly turned out of possession, and that he thereupon re-entered and broke open the door of the house, in order to seize the plaintiff's goods. Everything which he might lawfully do in order to make the distress is admissible in evidence under this plea. (*y*) The plea puts in issue not only the matter of justification, but the tenancy and ownership of the goods. (*z*)

Plea of a Recovery of the Goods in an Action of Replevin.— A plea by the defendant, setting forth that the plaintiff commenced and prosecuted an action against the defendant in the county court of the district within which the distress was taken, and obtained the judgment of the court for the return of the goods, and has recovered his goods, and damages for the taking and detaining them, is a good plea in bar to an action for an excessive distress, as it shows that the plaintiff has already had his remedy. (*a*)

So where the defendant's broker appeared upon the plaintiff's premises and said, "Unless you pay me £21 for rent, and three guineas for expenses, I shall take your goods," and the plaintiff paid the money, it was held that it did not lie in the defend-

(*u*) Wightman, J., *Wheeler v. Branscombe*, 5 Q. B. 379.

(*x*) Reg. Gen. Hil. Term, 16 Vict. R. 21; 1 Ell. & Bl. App. lxxxiii.; Jud. Act. Or. R. 16.

(*y*) *Eagleton v. Gutteridge*, 11 M. & W. 469.

(*z*) *Williams v. Jones*, 11 Ad. & E. 643.

(*a*) *Phillips v. Berryman*, 2 Doug. 288.

ant's mouth, after receiving the money, to say there was no distress. (*b*)

Proof of Excessive Distress. — It is not, as we have seen, for every trifling excess that an action is maintainable for an excessive distress. It must be disproportionate to some considerable extent (*ante*, p. * 326), and must be productive of actual loss or damage to the plaintiff. (*c*)

[* 339] * If the ground of action is that the defendant distrained for more rent than was really due, the plaintiff must prove that he tendered to the defendant the sum really due, with enough to cover the lawful charges of the distress; (*d*) or that the defendant sold the things distrained, and realized by the sale of them more than was sufficient to satisfy the rent really due, with the costs of the distress. (*e*) A distress may, as we have seen, be excessive, although the goods when sold may realize less than the rent and expenses. (*f*)

Proof of Material Averments in the Declaration. — The statement in a declaration for an unlawful distress of the name of the person to whom the rent distrained for is due, is material, and must be proved as laid. (*g*) But it is not necessary to prove the precise amount of rent alleged in the declaration to be due. (*h*)

Proof of Waiver of Right of Action. — A right of action for an unlawful or excessive distress, once vested, can only be destroyed by a release under seal, or by the acceptance and receipt of something in satisfaction of the wrong done. A tenant, therefore, does not waive his right of action for an excessive distress, though he afterward enters into a written agreement with his landlord respecting the sale of the effects seized. (*i*)

(*b*) *Hutchins v. Scott*, 2 M. & W. 811.

(*c*) *Rodgers v. Parker*, 18 C. B. 112; 25 L. J. C. P. 220; *Lucas v. Tarleton*, 3 H. & N. 120; 27 Law J. Exch. 246; *Piggott v. Birtles*, 1 M. & W. 450.

(*d*) *Glynn v. Thomas*, 11 Exch. 878; 25 Law J. Exch. 125.

(*e*) *Tancred v. Leyland*, 16 Q. B. 680; *French v. Phillips*, 1 H. & N. 567.

(*f*) *Smith v. Ashforth*, *ante*, p. * 327.

(*g*) *Ireland v. Johnson*, 1 B. N. C. 166.

(*h*) *Gwinnett v. Phillips*, 3 T. R. 643; *Sells v. Hoare*, 8 Moore, 454.

(*i*) *Willoughby v. Backhouse*, 2 B. & C. 821; *Baylis v. Usher*, 4 M. & P. 790; 7 Bing. 153.

Proof of Tenancy as between Plaintiff and Defendant, if not admitted upon the record, may be established by parol evidence of the fact, notwithstanding that the tenancy has been created by a lease or agreement in writing not produced. (*k*) Proof of payment and acceptance of rent will establish the fact of the relationship of landlord and tenant between the person paying and the person receiving the rent, notwithstanding the existence of a written contract of demise between them which is not produced. (*l*) And "I have no doubt," observes Bayley, J., "that submitting to a distress acknowledges the tenancy. The landlord after distraining cannot bring an ejectment; and the occupier, if he does not replevy, is, I think, precluded from denying the title of the landlord." (*m*) But payment of rent under a distress is not a conclusive admission of the title of the distrainer. Counter-evidence may be given on the part of the tenant to show that the distrainer never had any title. (*n*)

* Proof of payment of rent by a tenant to an agent [*340] of the landlord who has received it on account of the landlord, and paid it over to him, is evidence against the tenant that he holds of such landlord, although the latter was unknown to him, and he supposed at the time he paid the money that the agent received it on account of another person. (*o*) But proof of payment of rent to a particular individual claiming to be entitled to receive it is only *prima facie* evidence of a tenancy under the claimant, and the presumption of the particular tenancy may be rebutted by proof that the payment was made by mistake or under a false representation. (*p*)

Proof of an attornment by the tenant to a receiver appointed by the Court of Chancery, is proof of a tenancy by estoppel as between the tenant and the receiver; but the attornment does not enure to the benefit of the person subsequently declared by the court to be the owner of the property. (*q*)

(*k*) *Rex v. Hull*, 7 B. & C. 611; 1 M. & Ry. 448.

(*l*) *Doe v. Morris*, 12 East, 237, 239, n. 54.

(*m*) *Panton v. Jones*, 3 Campb. 372; *Cooper v. Blandy*, 4 M. & Sc. 569; 1 B. N. C. 45.

(*n*) *Knight v. Cox*, 18 C. B. 645.

(*o*) *Hitchings v. Thompson*, 5 Exch.

(*p*) *Fenner v. Duplock*, 9 Moore, 40.

(*q*) *Evans v. Matthias*, 7 Ell. & Bl. 590; 26 Law J. Q. B. 309.

Proof of the Nature and Terms of a Tenancy will best be effected by production of the written demise, where the tenant holds under a lease or agreement in writing. If the contract is in the hands of the defendant, the plaintiff who desires to prove the amount of the rent, the time at which, or the circumstances under which, it became due, should give notice to the defendant to produce it at the trial, in order to let in secondary evidence of its contents. (*r*) The old rule of law, that the terms of a tenancy or the amount of the rent can be proved only by the production of the writing when the tenant holds under a written contract of demise, does not exclude evidence of admissions and acknowledgments of those terms made by a defendant holding under a lease in writing not produced. It has been held that whatever a person says, or his acts amounting to admissions, are evidence against himself, although they relate to the contents of some deed or writing, and go to prove the nature and contents of a written instrument not produced. (*s*) Where, therefore, a defendant held lands under a written demise, it was held that the defendant's verbal declarations of the existence of the tenancy, and of the amount of the rent paid by him to the plaintiff, were admissible in evidence against him, without the production of the writing under which he held. (*t*)

Where on the letting of lands the terms of the demise were read from a printed paper by the landlord's agent, [*341] and the tenant * entered and occupied, and paid rent, it was held that the agent might give oral evidence of the terms, using the printed memorandum to refresh his memory. (*u*)

Damages Recoverable — Double Value. — By 2 Wm. & M. sess. 1, c. 5, sect. 5, it is enacted that if any distress and sale be made by virtue and under color of that act for rent pretended to be arrear and due, where no rent is arrear or due to the person distraining, the owner of the goods distrained and sold may, by action of trespass or upon the case against the person dis-

(*r*) Roscoe's *Nisi Prius Evidence*, p. 8.

(*s*) *Slatterie v. Pooley*, 6 M. & W. 668; *Boulter v. Peplow*, 9 C. B. 493; 19 Law J. C. P. 193; *Earle v. Picken*, 5 C. & P. 542.

(*t*) *Howard v. Smith*, 3 M. & Gr.

254; 3 Sc. N. R. 574.

(*u*) *Bolton (Lord) v. Tomlin*, 5 Ad. & E. 863.

training, recover double the value of the chattels so distrained and sold, together with full costs of suit. When an action is brought upon this statute for the seizure and sale of goods for rent pretended to be in arrear and due, when in truth no rent is in arrear or due to the person distraining, and the plaintiff claims double the value of the goods distrained, the jury should be directed, if they find for the plaintiff, to ascertain in the first place the actual value of the goods, and then to give damages to the plaintiff to the amount of double the value. If the jury assess the damages generally at a certain sum, and it turns out that they have assessed only the actual value or the single damage, the mistake cannot be rectified, and judgment cannot be entered up for the double or treble value. But if they expressly find and assess only the actual value, the plaintiff may apply to the court to have judgment entered up for double value, according to the statute. (x)

Whenever the landlord has distrained without any right or authority to distrain, there is a trespass upon, and injury to, the realty, independently of the trespass in regard of the seizure of the chattels, and the tenant is entitled to recover substantial damages for the disturbance of the peaceful possession of his house, as well as for the unlawful seizure of the goods.

The Damages recoverable where the Entry upon the Premises was effected in an Unlawful Manner, and the parties had no right to touch the goods after they had entered, by reason of the trespass in entering, are the same as would be recoverable from a stranger who had broken and entered the house without any color of authority; and it does not lie in the defendant's mouth to say, in mitigation of damages, that he had sold the goods, and applied the proceeds of the sale in satisfaction and discharge of the rent. (y) Where a distress is wrongful, the party distrained upon has a right to be replaced in the situation in which he was before the seizure; for "parties are not to extort even what is justly due by the *improper [*342] execution of a warrant." If goods, therefore, wrongfully distrained have been sold, or money has been paid to

(x) *Masters v. Farris*, 1 C. B. 716; (y) *Attack v. Bramwell*, 32 Law J. Add. on Torts (5th ed. by Cave), p. 75, Q. B. 146.
Double and Treble Damages.

procure the liberation of goods distrained, the value of the goods in the one case and the money paid in the other will be recoverable, as well as any special damage that may have been sustained; and the landlord cannot appropriate the money he has received by trespass and wrong in payment of the rent due to him. (z)

Recovery of Special Damage. — We have already seen that by the express terms of the 11 Geo. II. c. 19, sect. 19, the party injured by an unlawful act committed *after* a lawful distress, is only to recover the amount of damage he has actually sustained. This damage, in the case of a wrongful seizure and sale of growing crops, is the difference between the amount for which the crops would have been sold if the sale had been regular, and what they actually sold for; and where there is no difference, or it is proved that the crops were sold for more than they were worth, no damages are recoverable, and the defendant is entitled to a verdict. (a)

In an action for selling goods distrained for rent without an appraisement, and without complying with the provisions of 2 Wm. & M., sess. 1, c. 5 (*ante*, p. * 330), the measure of damages is the real value of the goods sold, minus the rent. The wrongdoers cannot get off by handing over to the plaintiff the mere proceeds of the sale. (b)

In an action for an excessive distress, where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure, the plaintiff is not entitled to recover the full value of the crops beyond the amount for which the distress ought to have been levied. "The true measure of damage is simply a compensation for the additional expense of a distress, and of keeping possession of that part of the crops which it was unnecessary to take during the time of possession, and some compensation for the loss of the absolute ownership and power of disposition for the same time; or, if the tenant has replevied, then a compensation for

(z) *Attack v. Bramwell*, 3 B. & S. *Proudlove v. Tremlow*, 1 Cr. & M. 520; 32 Law J. Q. B. 146; *Sowell v.* 326.

Champion, 6 Ad. & E. 407.

(b) *Knight v. Egerton*, 7 Exch. 407;

(a) *Rodgers v. Parker*, 18 C. B. 112; *Biggins v. Goode*, 2 Cr. & J. 367; *Whit-Lucas v. Tarleton*, 3 H. & N. 116; *worth v. Maden*, 2 C. & K. 517.

the additional expense and inconvenience of replevying to a greater amount." (c)

Where the plaintiff in his declaration for a wrongful distress claimed damages for the loss of divers lodgers, without naming any, Lord Ellenborough refused to allow him to prove that he had * in fact lost a lodger, because the name of [*343] the lodger had not been specified in the declaration. (d)

If the landlord takes some things that are distrainable and other things which are not, this does not render the distress wrongful *ab initio*, but the wrong is limited to the seizure of the goods which were not distrainable; and the tenant is entitled to recover only the actual damage sustained by him from the seizure of those particular chattels. (e) In respect of the things not distrainable, the distrainer is a trespasser *ab initio*, and the full value of them is recoverable. (f)

Nominal Damages are recoverable in an action for an excessive distress where no actual damage is proved. (g)

SECTION III.

THE LETTING OF CHATTELS.

Of Bailments for Hire.¹—The term bailment, derived from the French word *bail* or *bailler*, to deliver, denotes, in the common law, a delivery or transfer of a chattel from one person to another, in order that something may be done with it, either for the

¹ Edwards, Bailments, sects. 325–409; Story, Bailments, 323–380, sects. 368–420; Schouler, Pers. Prop. 704–712; U. S. Dig. tit. *Bailment*, 379–420; 2 Kent, Com. 586. Recent decisions are: Buford v. Tucker, 44 Ala. 89; Stewart v. Davis, 31 Ark. 58; Chamberlin v. Cobb, 32 Iowa, 161; Field v. Brackett, 56 Me. 121; Rielly v. Rand, 123 Mass. 215; Howe v. Meekin, 115 Mass. 326; Negus v. Simpson, 99 Mass. 388; Buis v. Cook, 60 Mo. 391; Buchanan v. Smith, 10 Hun, 74; Wilcox v. Palmeter, 2 Hun, 517; Austin v. Miller, 74 N. C. 274; Gaff v. O'Neil, 2 Cin. 246; Ray v. Tubbs, 50 Vt. 688.

(c) Piggott v. Birtles, 1 M. & W. 451.

(d) Westwood v. Cowne, 1 Stark. 172.

(e) Harvey v. Pocock, 11 M. & W. 740.

(f) Keen v. Priest, 4 H. & N. 236;

28 Law J. Exch. 157; Attack v. Bramwell, *ante*, p. *342; Edmondson v. Nuttall, 34 Law J. C. P. 102.

(g) Chandler v. Doulton, 3 H. & C. 553; 34 Law J. Exch. 89.

benefit of the owner, or of the party who receives it as the temporary possessor, or for the mutual benefit of both of them, and is applied to contracts for the letting and hiring of chattels, as well as to contracts for the delivery of them to persons for safe custody or to workmen to be worked upon or dealt with in the course of their employment. The term is also equally applicable to contracts for the letting and hiring of realty, although it is not used in the common law to denote that class of contracts. In the French law, the term *BAIL à loyer*, or bail for hire, anciently denoted a contract for the letting and hiring of a house, or farm, or immovable property; but in modern times it has been applied by the French jurists to contracts for the letting and hiring of personalty as well as of realty. In this class of contracts, the person who delivers the chattel for the purposes of the contract is called the *bailleur*, or bailor, and the party who receives it the bailee.

[* 344] * If one man bails or delivers a chattel to another to be used for hire upon the express or implied understanding that the chattel is to be put into a serviceable state and made ready for immediate use by the hirer, there is no implied warranty or undertaking on the part of the bailor that the chattel is in any particular state or condition, or fit for any particular purpose. But if he expressly or impliedly represents it to be fit for immediate use, or to be applicable to any particular purpose, he impliedly warrants the use for which he receives the hire. If a man, for example, lets out the naked hull or the mere fabric of a vessel, upon the terms that the hirer is to man and equip her and get her ready for sea, there is no implied warranty or undertaking on the part of the shipowner that the vessel is in any particular state and condition at the time of the making of the contract. But if he mans and provisions and equips the vessel himself, and holds her out as fit for immediate use, there is an implied promise or undertaking on his part that she is seaworthy and fit for use, and properly found and provided with stores and provisions, seamen and officers, and all things needful to the due prosecution of the voyage. (a) So if a man lets out the mere

(a) *Lyon v. Mells*, 5 East, 437; *Burgess v. Wickham*, 33 L. J. Q. B. 17; 43 L. J. C. P. 390; 41 L. J. C. P. 180; *Stanton v. Richardson*, L. R. 7 C. P. 521; 9 C. P. 230; *Steel v. The State Steamship Co.*, 3 Ap. Cas. 72.

fabric of a coach or carriage upon the understanding that the hirer is to provide the horses, harness, servants, and equipments, and prepare the vehicle for use, there is no implied warranty or undertaking on his part that the chattel is in any particular state or condition at the time that he parts with the possession of it ; but if he gets it ready for the road, he impliedly warrants the vehicle to be road-worthy and fit for the performance of the journey for which it is known to be required ; and this implied warranty extends to the coachman, horses, and harness, and all the other necessary equipments for the journey. And if a man lets out furniture for immediate use, there is an implied warranty on his part that it is fit for use, and free from all defects inconsistent with the reasonable and beneficial enjoyment of it. (b) “ If he lets out vessels for holding oil or wine, and furnishes to the hirer vessels that are not in good condition, he shall be responsible for the damage that may accrue ; for he who lets out a thing for use ought to know whether it is fit for use, and to warrant the use for which he takes the hire.” (c) If he lets out a horse bridled and saddled, and prepared for immediate use by an equestrian, he impliedly warrants the equipments to be road-worthy and fit for use, and the horse itself to be well shod, (d) and free from such vices and defects as render it dangerous and unfit to ride.

*** Of the Duties and Responsibilities of the Hirers of [* 345] Chattels.**— If a coach-proprietor lets his coach and horses for a journey, and the coach is driven by the coachman, and is under the direction and management of the servants, of the owner, the latter is bound to keep the horses properly shod, and the carriage in good travelling order ; but if the possession thereof is transferred to the hirer, and the carriage is driven and managed by the hirer’s servants, this duty then falls upon the hirer, although the owner or letter of the chattel may under certain circumstances be obliged, as we shall presently see, to repay to the hirer the money expended by him in repairs. (e) Whenever a chattel bailed or delivered to a hirer to be used for

(b) *Sutton v. Temple*, 12 M. & W. 60.

(c) *Domat*, l. 1, tit. 4, sects. 3, 8; *Dig.* lib. 10, tit. 2, 19, sect. 1.

(d) *Pothier (Louage)*, No. 54; *Blackmore v. Brist. & Exeter Ry. Co.*, 8 Ell. & Bl. 1051; 27 L. J. Q. B. 167.

(e) *Pothier (Louage)*, No. 117, 129.

hire has sustained a partial injury through an inherent defect in the article itself, or by reason of some inevitable accident which threatens its total and immediate destruction, and the effects of such partial injury may be obviated and the chattel preserved for future use by repairs and remedies promptly provided, there is an implied authority from the owner to the hirer to undertake the necessary repairs and apply the remedies, and incur all such expenses as a prudent man would, under the circumstances, incur for the preservation of his own property. In order to establish a claim for the payment of expenses of this description in the Scottish law, it is necessary, observes Mr. Bell, to show in the first place that the occasion of the expense was not ascribable to the hirer; secondly, that the expense was indispensably necessary; and thirdly, that the owner had notice of it as soon as circumstances permitted. (*f*)

Of the Use of Chattels let to hire — Losses from Negligence.¹—

Every hirer of a chattel is bound to use the thing let in a proper and reasonable manner, to take the same care of it that a prudent and cautious man ordinarily takes of his own property, and to return it to the bailor or owner at the time appointed for its return (or within a reasonable period after request, if no such time has been agreed upon), in as good condition as it was in at the time of the bailment, subject only to the deterioration produced by ordinary wear and tear and reasonable use, and by injuries caused by accidents which have happened without any fault or neglect on the part of the hirer. Where the hirer contracted to deliver up a barge at the conclusion of the hiring "in good working order, with all her rigging, gear, and implements complete," it was held that this must be construed with reference to the condition of the barge (which was an old one) at the commencement of the hiring. (*h*)

Losses from Piracy, Robbery, Theft, Disease, and Acci-
 [* 346] **dent.** — If the *thing let to hire perishes, or is destroyed

¹ On negligence of hirers, see Edwards, Bailments, sect. 381; Story, Bailments, 345; U. S. Dig. tit. *Bailment*, 29-66; also *Frost v. Plumb*, 40 Conn. 11; *Fisher v. Kyle*, 27 Mich. 454; *Wentworth v. McDuffie*, 48 N. H. 402; *Collins v. Bennett*, 46 N. Y. 490; *Feltman v. Gulf Brewery*, 42 How. Pr. 488.

(*f*) 1 Bell's Com. 453.

(*h*) *Shroder v. Ward*, 13 C. B. N. s. 410; 32 L. J. C. P. 150.

by fire, or is stolen without any neglect or want of care on the part of the hirer, the latter will not be responsible for the loss; (*i*) but in cases of stealing, a robbery by force must be proved, or if there has been a secret theft, it must be shown by the hirer that he had taken all such precautions as are ordinarily taken by prudent men to protect their own property from depredation. If a ship hired for a particular voyage, and placed in the possession and under the control of the hirer, be captured by pirates or be lost in a storm in the ordinary course of the voyage, the owner must bear the loss; but if the hirer has deviated from the ordinary course and sailed unnecessarily through dangerous channels or into seas infested with pirates, and needlessly encountered risks not contemplated by the owner at the time of the hiring, and which would probably not have been run by him except for a greatly increased rate of remuneration, the hirer is liable for the loss.

An owner of a chattel which is out on hire for an unexpired term may maintain an action against a third person for a permanent injury thereto. (*k*)

Determination of the Bailment. — If chattels have been bailed or let to hire for a certain term, and the bailee does an act which is equivalent to the destruction of the chattels, or which is entirely inconsistent with the terms of the bailment; if he sells, or attempts to sell, the chattels, or to dispose of them in such a way as to put it out of his power to return them; the act operates like a disclaimer of tenancy (*ante*, p. *257), the bailment is at an end, and the possessory title reverts to the bailor, and entitles him to maintain an action for the value of the chattels. (*l*)

Loans of Money to be used for Hire. — The lending of money for hire is ordinarily denominated a loan at interest, as distinguished from a *commodatum*, or gratuitous loan, where the sum advanced only is paid back without any interest or fruits of increase. A loan of money to be used for hire is a loan for use and consumption, the identical thing lent not being intended

(*i*) *Williams v. Lloyd*, W. Jones, 179; P. 220; and see *Lancashire Wagon Co. v. Taylor v. Caldwell*, 3 B. & S. 836; 32 L. J. Q. B. 164. *v. Fitzhugh*, 6 H. & N. 502; 30 L. J. Ex. 231.

(*k*) *Mears v. London & South-West Ry. Co.*, 11 C. B. N. s. 850; 31 L. J. C. 21. (*l*) *Fenn v. Bittlestone*, 7 Exch. 159; 21 L. J. Ex. 41.

to be returned, but its equivalent in value and kind. The absolute property, therefore, in the subject-matter of the loan passes, together with the transfer of the possession, to the hirer or borrower; and the latter becomes indebted to the lender in an equivalent in value and amount, with interest, which must be paid and rendered to the latter at the time agreed upon, or within a reasonable period after demand made, in case no time [* 347] * for its return has been limited. The liability of the hirer or borrower, consequently, to repay the equivalent amount is not discharged by the loss of the money from robbery, fire, or inevitable accident.

Of Commodatum and Mutuum, or Gratuitous Loan.¹— If the bailee is to have the use and enjoyment of the subject-matter of the bailment for his own benefit and advantage, without payment of hire or reward to the bailor, then the bailment becomes a gratuitous loan. There are in the civil law two kinds of gratuitous loans, the one called a *MUTUUM*, which is a loan for use and consumption, the thing being bailed to be consumed, and an equivalent in kind subsequently returned; and the other a *COMMODATUM*, which is a loan of a specific chattel to be used by the bailee and returned *in individuo*. In the loan by way of *mutuum* the bailor is called the creditor, by reason of the credit given by him to the promisee of the bailee, and the latter the debtor, because he owes an equivalent to be paid back. (*m*) In the loan by way of *commodatum*, the parties are known in law by the ordinary appellation of borrower and lender. “The Latin language,” observes Gibbon, “very happily expresses the fundamental differences between the *COMMODATUM* and the *MUTUUM*, which our poverty is reduced to confound under the vague and common appellation of a loan. In the former, the borrower was obliged to restore the same individual thing with which he had

¹ See Edwards, Bailments, c. iv.; Story, Bailments (9th ed.), 202, 252; U. S. Dig. tit. *Bailment*, sects. 133–164; and the following recent cases on the rights of a gratuitous bailee: *Eldridge v. Hill*, 97 U. S. 92; *Hagebash v. Ragland*, 78 Ill. 40; *Francis v. Shrader*, 67 Ill. 272; *Cullen v. Lord*, 39 Iowa, 302; *Beller v. Schultz*, 44 Mich. 529; *Dale v. Brinckerhoff*, 7 Daly, 45; *Lain v. Gaither*, 72 N. C. 234; *Rankin v. Craft*, 1 Heisk. 711; *Danville Bank v. Waddill*, 31 Gratt. 469; *Nudd v. Montanye*, 38 Wis. 511.

been accommodated for the temporary supply of his wants; in the latter, it was destined for his use and consumption, and he discharged this *mutual* engagement by substituting the same specific value according to a just estimation of number, of weight, and of measure." (*n*)

If corn or potatoes, wine or brandy, coals or oil, be borrowed, they are borrowed to be consumed, the corn being eaten, the wine drunk, and the coals and oil burned and consumed. A loan of this description, therefore, is necessarily a *mutuum*; for the identical thing lent cannot be returned, but an equivalent in kind must be rendered back. If money is lent to be used, the money is necessarily mixed with other coin of a similar denomination; it passes into other hands; its identity and individuality are destroyed; and the specific pieces of coin cannot be rendered back. A loan of money, therefore, is a *mutuum*, the borrower being bound to restore not the identical money lent, but an equivalent in the shape of money of the same denomination and value. (*o*) But if a horse or a book be lent for use, the identity and individuality of the chattel are not destroyed or in any way affected by the use; the same *horse and the [*348] same book remain, though the one may have been ridden and the other read; the loan, therefore, is a *COMMODATUM*, and the borrower does not fulfil his engagement by rendering an equivalent in the shape of a different horse or a different book of equal value, but is bound to return the identical thing lent. (*p*) It is of the very essence of a *commodatum* that the subject-matter of the bailment be granted to be used free of reward; for if anything be paid for the use of the chattel, the contract is a contract of letting and hiring, and belongs to the class *LOCATIO REI*. (*q*)

Liabilities of the Borrower — Of the Care to be taken of Things borrowed — Negligence and Misconduct of the Borrower. — In a bailment by way of *mutuum*, the chattel bailed becomes the

(*n*) Gibbon's Roman Empire, c. 44, meo tuum fiat."—*Inst.* lib. 3, tit. 15; 3, 2. *Dig.* lib. 13, tit. 6, l. 3, sect. 6.

(*o*) "Et, quoniam nobis non eadem (*p*) *Doct.* and *Stud.* *Dial.* 2, c. 38. res, sed aliæ ejusdem naturæ et qualitatis (*q*) *Inst.* lib. 3, tit. 15, sect. 2; *Dig.* redduntur, inde etiam mutuum appellatum est, quia ita a me tibi datur, ut ex lib. 13, tit. 6.

absolute property of the bailee to do what he pleases with it, and use it in any way he thinks fit; (r) but in a bailment by way of *commodatum*, the temporary right of possession and user only are transferred, the right of property remaining in the lender; (s) and the borrower, consequently, is obliged to render back the identical thing lent in as good a condition as it was in when borrowed, subject only to the deterioration resulting from inherent defects or produced by ordinary wear and tear and the reasonable use of it for the purpose for which it was known to be required. (t) "If I lend a piece of plate, and covenant by deed that the party to whom it is lent shall have the use of it, and the plate be worn out by ordinary use and without any fault, I shall have no remedy for the loss. (u) But the borrower is bound," observes Holt, C. J., "to the strictest care and diligence to keep the goods so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so that if the bailee be guilty of the least neglect, he will be answerable; as if a man should lend another a horse to go westward, and the bailee go northward, if any accident happen to the horse on the northern journey, the bailee will be chargeable, because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no otherwise than as he was lent, that accident would not have happened to him." (x) If a horse is lent for the performance of an ordinary journey, and the borrower leaves the high-road and travels unnecessarily through by-paths or dangerous roads, and the horse falls and is injured, he will be [*349] responsible to the lender; but if * the horse is lent for the purpose of hunting, then the borrower is justified in using it in by-paths and dangerous places, and may expose it to all the ordinary risks of the chase, because those risks are necessarily incident to the use for which the horse was bor-

(r) "Appellata est autem mutuidatio ab eo, quod de meo tuum fit: et ideo, si non fiat tuum, non nascitur obligatio." — *Dig. lib. 12, tit. 1, sect. 2, Inst. lib. 3, tit. 15.*

(s) "Nemo enim commodando rem facit ejus cui commodat." — *Dig. lib. 9,*

(t) *Handford v. Palmer*, 5 Moore, 76.

(u) *Hale, C. B., Pomfret v. Ricroft*, 1 Saund. 323 b.

(x) *Coggs v. Bernard*, 2 Raym. 915; *Bract. lib. 3, c. 2, sect. 1*, pp. 99, 100.

rowed, and were known to and must have been contemplated by the lender.

The owner must stand to all the ordinary risks to which the chattel is naturally liable, but not to risks occasioned by negligence or want of ordinary caution on the part of the hirer. If a carriage, for example, let to hire, breaks down on the ordinary public thoroughfare, through the badness of the road, or is injured by a flood or inundation, the owner must bear the loss, although the carriage was driven by the servants and horses of the hirer. But if the hirer had gone out of his way to meet the danger,—if he had travelled by unusual and difficult roads, or crossed a plain subject to floods, when he might have kept the high ground and been safe,—he must make good the loss that has been occasioned thereby. If the owner sends his own postilion or coachman to drive the carriage, the hirer is discharged from all attention to the horses and the risks of the road, and is bound only to take ordinary care of the glasses and inside of the carriage whilst he sits in it, unless he officiously interferes and gives orders, and takes the management and direction of the vehicle into his own hands. (y) If a horse is hired as a saddle-horse, the hirer has no right to use it in a cart or as a beast of burden. If it is hired to go to Richmond, he has no right to go with it to York; and if during such misuser a loss occurs, the hirer will be responsible therefor.

If a horse hired for a journey is taken ill on the road, and the hirer calls in a farrier, he will not be responsible if the horse dies, although the death may have been occasioned by the injudicious treatment of the latter. But if the hirer neglects to avail himself of proper advice and assistance, or chooses ignorantly to prescribe himself, and from unskilfulness gives the horse improper medicine, and the horse dies, he is liable to the owner for the loss. (z) It is, of course, the primary duty of the hirer, in the absence of an express stipulation to the contrary, to supply an animal hired by him with suitable food during the time it is intrusted to him for use; and if a hired horse is exhausted, or becomes ill, and refuses its food, and the hirer, notwithstanding,

(y) Jones on Bailments, 88; Pothier (*Louage*), No. 106, 190; Tr. des Oblige. 1, 543.

(z) *Deane v. Keate*, 3 Campb. 4.

pursues his journey, and by so doing injures or kills the horse, he will be responsible therefor to the owner. (a)

[* 350] *The gratuitously permitting a person to use a shed, by himself or his servant, for a particular purpose, is a mere revocable license, and has no analogy to a bailment of personal property; and the only duty imposed on such person is that there shall not be negligence in the use of the shed; and he is not liable for the negligence of his servant not within the scope of his employment. (b)

Losses from Ordinary Casualties.—The measure of care and diligence to be exercised for the protection and preservation of a thing bailed by way of *commodatum*, whilst it remains in the possession of the borrower, is that amount of care, prudence, and foresight which the most vigilant and careful of men exercise for the preservation and protection of their own property. The foundation for this increased liability on the part of the borrower, in comparison with the hirer of a chattel, arises from the fact that the lender himself derives no benefit from the contract, but in making the bailment performs a gratuitous act of kindness dictated by his confidence in the bailee. The borrower cannot be made responsible for inevitable accidents or casualties which could not have been foreseen, and which no human prudence could have guarded against; but he will be answerable for the “least neglect.” If the borrower of a horse puts the horse into his stable, and the horse is stolen from thence, the borrower will not be answerable for him. But if the borrower or his servant leave the stable-doors open at night, and thieves take the opportunity of that and steal the horse, he will be chargeable for the loss; for the neglect to lock the door may have encouraged the thieves, and been the occasion of the robbery. (c)

Misuser by the Borrower. — Want of Skill.—If the borrower takes the horse off the highroad against the will of the lender, and rides him into wet and slippery ground, and the horse slips

(a) *Handford v. Palmer*, 5 Moore, 79; 2 B. & B. 359; *Bray v. Mayne*, 1 Gow, N. P. C. 1.

(b) *Williams v. Jones*, 33 L. J. Ex. 297.

(c) *Coggs v. Bernard*, 2 Raym. 916; Dig. lib. 44, tit. 7, l., sect. 4; Bract. lib. 3, c. 2, p. 99; Inst. lib. 2, tit. 15, sect. 2; Doctor and Student, Dial. 2, c. 38.

and is injured, the borrower must make good the loss. It has been said that every lender of a horse for riding, impliedly bargains, at the time he makes the loan, for the exercise on the part of the borrower of competent skill in riding and the management of a horse; (*d*) but if the bailor chooses, without making any previous inquiry, to entrust a fiery and high-spirited horse to a stranger, of whose skill in horsemanship he knows nothing, he has no right to expect the management and dexterity of an experienced rider. Neither, if he lends valuable property to a notorious drunkard or notoriously wild and reckless character, has he any right to expect the care * and [*351] attention of a very vigilant and painstaking person. (*e*)

By the civil law, the borrower is responsible for all losses and injuries to the thing borrowed occasioned by the private enmity of persons hostile to him, if he has by some fault or misconduct on his part provoked that enmity. (*f*) The loan of the use, moreover, is strictly personal to the borrower, founded on the confidence reposed in him, and does not, in general, warrant a user by his servants. (*g*)

Restoration of the Thing borrowed or its Equivalent — Loss by Robbery, Fire, or Inevitable Accident. — In the case of a loan by way of *MUTUUM*, the borrower is bound to restore, at the time agreed upon or within a reasonable period after request, an article of the same kind and quality as the one originally lent to him. If by the agreement of the parties an article of a different character is to be returned, the contract is not a *mutuum*, but an exchange or sale. (*h*) All such things, say the civilians, as are ordinarily regulated by number, weight, or measure, such as wine, corn, oil, money, brass, silver, or gold, may properly be made the subject of a *mutuum*, as they can readily be repaid in kind of the same quantity and quality; but a horse, a greyhound, a fowling-piece, and all chattels whose value depends upon the intrinsic qualities of each in particular and not upon the general attributes of the genus, cannot properly be made the

(*d*) Jones's Bailments, 65; Wilson v. Brett, 11 M. & W. 115.

(*e*) Pothier, *Pret à Usage*, c. 2, sect. 2, art. 2, No. 49; Bract. lib. 3, tit. 2, sect. 1, 99 b.

(*f*) Dig. lib. 19, tit. 2, lex 27, sect. 4.

(*g*) Bringloe v. Morrice, 1 Mod. 210.

(*h*) Dig. lib. 12, tit. 1, 2, 3; South Australian Insurance Co. v. Randell, L. R. 3 P. C. 101.

subject of a *mutuum*, because, although they are of the same kind, yet each one of the kind differs so much from another in quality and attributes, that the creditor cannot be compelled against his will to take one for another.

As the right of property in the thing bailed is transferred to the bailee by a bailment by way of *mutuum*, so also is the risk of loss. If, therefore, the bailee is robbed before he reaches home, or the thing bailed is destroyed by wreck, fire, or inevitable accident before it can be used, the bailee must, nevertheless, pay the equivalent which he owes to the bailor at the time appointed. (i) "If money, corn, wine, or any other such thing which cannot be re-delivered be borrowed, and it perish, it is at the peril of the borrower. But if a horse or a cart, or such other things as may be used and delivered again, be used according to the purpose for which they were lent, if they perish, he who owns them shall bear the loss, if they perish not through the default of him who borrowed them, or of him who made

[*352] a promise at the time of the *delivery to re-deliver them safe again. If they be used in any other manner than according to the lending, in whatever manner they may perish, if it be not by default of the owner, he who borrowed them shall be charged with them in law and conscience." (k) When the loan is made by way of *COMMODATUM*, the borrower must return the specific thing lent within a reasonable period after request, and if he neglects so to do, he is responsible for all accidents that afterward happen to it. He has no right to detain the thing borrowed for any antecedent debt due to him. "The plain reason is that it would be a departure from the tacit obligations of the contract. No intention to give a lien for a debt can be implied from the grant of a mere favor." Neither can the borrower set up a right to detain the chattel for the payment of necessary expenses incurred by him in the keeping and preserving it. (l)

Adverse Claimants — Eviction by Title paramount (*post*, p. *361).

Implied Obligations and Duties of the Lender. — There is an implied undertaking on the part of the lender to the borrower of

(i) Inst. lib. 3, tit. 15, sect. 2; Doct. & Stud. Dial. 2, c. 38; Bract. 99, a, b.

(k) Noy's Maxims, c. 43.

(l) Turner v. Ford, 16 M. & W. 212.

a chattel not to conceal from the borrower secret defects in the chattel known to the lender, which may make the use of the chattel perilous to the borrower. Thus, if one man lends a gun to another, and the lender knows at the time he lends the gun that it is unsafe and dangerous to use, and neglects to disclose the fact to the borrower, he will be responsible in damage to the latter if the gun bursts and injures him. (*m*) But a gratuitous lender of an article is not liable for injury resulting to the borrower or his servant, while using it, from a defect not known to the lender. (*n*)

Loans of Money to one of Several Partners.—Where one of several partners, who was travelling for orders, called upon the plaintiff in the country, and, after transacting business with him on account of the firm, borrowed a sum of money to defray his expenses back to London, Lord Kenyon held that, as the money was lent to the partner while employed on the partnership business, the partnership was responsible for the payment of the debt. (*o*) But if the partner professes to borrow money for the firm, and misapplies it, and there be proof that the plaintiff lent it under circumstances of negligence, and out of the ordinary course of business, he cannot recover the amount from the other partners. (*p*) And if the creditor lending the money advances it at the request of one of the partners, for [*353] the known private purposes and private accommodation of the latter, and not for the trading purposes of the co-partnership, such creditor cannot make the firm responsible for the repayment of the money. (*q*) If money is lent on the individual security and credit of one partner alone, the firm at large cannot be charged with the re-payment of it, although it may in fact be subsequently applied to the use of the partnership. Thus, where one partner was in the habit of drawing bills in his own name, and getting them discounted by the plaintiff, and using the proceeds of such bills in the business of the firm, and applying them to the general purposes of the partnership, it was held

(*m*) *Blakemore v. Brist. & Ex. Ry. Co.*, 8 Ell. & Bl. 1051; 27 L. J. Q. B. 167.

(*n*) *MacCarthy v. Young*, 6 H. & N. 329; 37 L. J. Ex. 227.

(*o*) *Rothwell v. Humphreys*, 1 Esp. 405.

(*p*) *Loyd v. Freshfield*, 9 D. & R. 19.

(*q*) *Bishop v. Countess of Jersey*, 23 L. J. Ch. 483.

that the plaintiff could not treat the money advanced by way of discount on the bills accepted by the partner in his own name only as a loan to the firm. (*r*) But where a member of a partnership was in the habit of drawing bills in his own name upon the firm, and getting them discounted, and applying the proceeds to the general purposes of the partnership, and the firm regularly accepted and paid the bills so drawn until it became bankrupt, it was held that the members of the firm must be taken to have given their co-partner authority to raise money for the use of the firm upon the bills in question, and that the money advanced by way of discount upon them might be treated as a loan to the partnership. (*s*) There is no implication of law from the mere existence of a trade partnership, that one partner has authority to bind the firm by opening a banking account on its behalf in his own name. (*t*)

Loans to Registered Companies.—There is nothing illegal in a registered company commencing business, and proceeding to raise money in the exercise of their borrowing powers, before the whole of the nominal capital has been subscribed. (*u*) If the directors of a registered joint-stock company are empowered to borrow money, the power to be exercised in accordance with certain prescribed formalities, and the directors borrow money without complying with the formalities, this is a matter between them and the shareholders, and does not deprive the lender of his rights against the company, (*v*) for he has a right to presume that the formalities have been gone through; but if they have no such powers the lender should have informed himself of the fact, and he cannot *recover from the company. (*y*) Although the managers of the company are raising money for purposes unauthorized by the deed of settlement or articles of association, yet, if the shareholders, with full knowledge of these transactions, take no steps to ascertain

(*r*) *Emly v. Lye*, 15 East, 11; *Smith v. Craven*, 1 Cr. & J. 500; *Bevan v. Lewis*, 1 Sim. 376.

(*s*) *Denton v. Rodie*, 3 Campb. 493; *Ex parte Bolitho*, Buck, 100.

(*t*) *Alliance Bank v. Kearsley*, L. R. 6 C. P. 433; 40 L. J. C. P. 249.

(*u*) *M'Dougall v. Jersey Imp. Hotel Co. (Limited)*, 34 L. J. Ch. 28.

(*x*) *Agar v. Athenæum Assur. Co.*, 3 C. B. N. s. 753; *Royal British Bank v. Turquand*, 6 Ell. & Bl. 332; *Fountain v. Carmarthen Ry.*, L. R. 5 Eq. 316.

(*y*) *Irvine v. Union Bank of Australia*, 2 Ap. Cas. 366.

whether the capital has been properly increased or not, but reap the benefit derived from the increase, they cannot be afterward heard to say that the money was not advanced for the general use and purposes of the partnership. (z) And whenever money has been borrowed by directors and has been expended in furtherance of the general purposes of the company, and the shareholders have had the benefit of the loan, they will not, in general, be allowed to repudiate the transaction on the ground that the directors had no power to borrow. They cannot keep the money and repudiate the agency by which it was obtained. (a) Debentures issued by a company under a general power of borrowing, in part discharge of existing debts, are valid. (b)

Damages in Actions for not replacing Stock.¹—In an action for not replacing stock lent on a given day, the measure of damages is the value of the stock in the market on the day on which it ought to have been replaced, or at the time of trial, at the option of the plaintiff. (c) Where, however, a stock mortgage was made for a term of years for securing the re-transfer of stock at the end of the term, and payment in the meantime of interest calculated on the proceeds of the stock sold to raise the loan, and, the mortgage having been allowed to run after the end of the term, the stock fell in price, it was held that the mortgagee was not entitled to the market value of the stock at the end of the term, but that the mortgagor could redeem on replacing the specific amount of stock originally sold. (d) If dividends are to be paid in the intermediate time, interest may be given upon the value of the capital stock. (e)

¹ See Dos Passos, *Stockbroker and Stock-Exchanges*, c. xi.; *Capron v. Thompson*, 86 N. Y. 418.

(z) *Re Magdalena St. Nav. Co.*, 29 L. J. Ch. 667.

(a) *Elect. Tel. Co.*, *in re*, 30 Beav. 225; *Troup*, *in re*, 29 Beav. 353.

(b) *Inns of Court Hotel Co.*, *in re*, L. R. 6 Eq. 82. And as to borrowing money on debentures, see *post*, p. *823.

(c) *Shepherd v. Johnson*, 2 East, 211; *M'Arthur v. Ld. Seaforth*, 2 Taunt. 257; *Downes v. Back*, 1 Stark. 318; *Owen v. Routh*, 14 C. B. 327.

(d) *Blyth v. Carpenter*, L. R. 2 Eq. 501; 35 L. J. Ch. 823.

(e) *Dwyer v. Gurry*, 7 Taunt. 14.

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* CHAPTER II.

CONTRACTS FOR SERVICES.

SECTION I.

WORK AND LABOR.

Deposit or Simple Bailment,¹ styled by the Roman lawyers *depositum*, may be defined to be a delivery or bailment of goods in trust to be kept for the bailor and re-delivered on demand. (*a*)

¹ On the law of deposits aside from banking, see Schouler, Bailments, Part II., p. 28; Story, Bailments, sects. 41-136; Edwards, Bailments, c. 2, sects. 10-73; U. S. Dig. tit. *Bailment*, sects. 76-113; article by F. R. Mechem on Rights and Duties of a Bailee toward Rival Claimants of the Goods, 14 Cent. L. J. 466.

Recent cases are : Depositary is not liable where he has been robbed of the deposit without his fault (*Danville Bank v. Waddill*, 31 Gratt. 469); or where it has been destroyed by war (*McCraie v. Wood*, 24 La. Ann. 406).

A barber who keeps a "coat-room," and a boy in attendance to receive and give "checks" for apparel of customers, is not liable for loss of an overcoat of a customer which the owner, knowing but disregarding the regulation, hung upon a peg near the door, whence it was stolen. *Trowbridge v. Schriever*, 5 Daly, 11.

No right of action accrues against a depositary before a demand and refusal to return the deposit, unless there has been a wrongful conversion. *McLain v. Huffman*, 30 Ark. 428.

A pledgee from the depositary, though he takes in good faith, acquires no title against the owner. *Gottlieb v. Hartman*, 3 Col. T. 53; and see *Branson v. Heckler*, 22 Kan. 610; *Small v. Robinson*, 69 Me. 425.

On a general deposit of money, depositary is liable for the sum, although stolen from him without his negligence. *Shoemaker v. Hinze*, 53 Wis. 116. Otherwise as to special deposit. *Schermer v. Neurath*, 54 Md. 491.

As to rights of the parties when the depositor unreasonably neglects to resume possession, see *Wright v. Paine*, 62 Ala. 45; *Bérard v. Boagni*, 30 La. Ann. Part II., 1125; *Dale v. Brinckerhoff*, 7 Daly, 45. And on other branches of the subject, see *Archer v. Walker*, 38 Ind. 472; *McGinn v. Butler*, 31 Iowa, 160; *Beyris v. Sporr*, 22 La. Ann. 16; *Britton v. Aymar*, 23 La. Ann. 63; *Hobson v. Woolfolk*, ib. 384; *Robinson v. Larabee*, 63 Me. 116; *Murray v. Stanton*, 99 Mass. 345; *Bates v. Stausell*, 19 Mich. 91; *Rand v. State Nat. Bank*, 77 N. C. 152; *Samuels v. McDonald*, 11 Abb. Pr. N. S. 344; 42 How. Pr. 360; *Moulton v. Phillips*, 10 R. I. 218; *Tancil v. Seaton*, 28 Gratt. 601.

(*a*) Dig. lib. 16, tit. 3, 1, sects. 45, 46.

It is of the very essence of a deposit that it be gratuitous; for if anything is to be paid for the care and custody of the article, it immediately becomes a contract for the letting and hiring of labor and services and care to be employed upon the chattel, and belongs to the class *LOCATIO OPERIS ET CUSTODIÆ*. Where shares were deposited with bankers by a customer under such circumstances as would have entitled the bankers to a lien upon them for their general banking account, it was held that they were bailees for reward. (*b*)

In the Roman law the term *depositum* is applied to the delivery of realty to be kept for the owner as well as to a delivery of personalty. Thus when a man during his absence from home committed his house and all that was in it to the keeping of a friend, this was called a deposit by the civilians. In the absence of an express contract between the parties, the nature of the bailment must be determined by the nature of the thing bailed, and upon what is required to be done for its preservation and safe keeping. When passive custody in some secure place of deposit alone is required, as in the case of most bailments of inanimate chattels, the bailment is a naked deposit or simple bailment, whilst, if work and labor, services and skill, are necessarily required for its preservation, as in the case of bailments of living animals or *perishable chat- [* 356] tels, then the bailment becomes, as presently mentioned, a mandate.

What is necessary to constitute a Deposit — Executory and Executed Promises. — To constitute a deposit, the subject-matter of the bailment must be either actually or constructively delivered to the bailee, or it must be in his possession or under his control at the time he undertakes the charge of it. A mere promise to take charge of a thing which has never either actually or constructively come into the possession of the promisor cannot constitute a deposit. But a delivery to the servant of the promisor, or to a person whom he has appointed to receive the chattel, and who has consented to hold it on his behalf, or any acts on the part of the promisor manifesting a clear intention to take charge of a thing which is not capable of manual delivery,

(*b*) *Johnston's Claim*, L. R. 6 Ch. 212; 40 L. J. Ch. 286.

but which has been placed at his disposal and under his control, will constitute a deposit in contemplation of law. Thus, in the Roman law, if a man went from home leaving the keys of his house with his neighbor, the bailee of the keys was considered to be the depositary of the house. If a creditor holding a pledge receives payment of the debt, but continues to hold the pledge, he becomes a depositary thereof for his former debtor. If a tradesman sells any specific chattel, but neglects to deliver it, he becomes a depositary for the purchaser. But a man cannot be made a depositary without his knowledge and consent; he cannot have the possession of another man's property, with its accompanying duties and responsibilities, forced upon him against his will. Thus if a tradesman anxious to sell his wares and merchandise sends them to my house without any previous communication with me and without having obtained my previous consent, and they are taken in by my servant, in my absence or without my knowledge, I do not by reason thereof become the depositary of the goods, and clothe myself with the care of them. (c)

Liabilities of the Depositary — Negligent Keeping — Ordinary Casualties. — A depositary is only bound to take that care of things accepted by him to keep which a reasonably prudent man takes of his own property of a like description. (d) He will be liable to make compensation to the owner if the goods are stolen, damaged, or lost by reason of gross negligence in the keeping of them; but he is not responsible for slight neglect or ordinary casualties. (e) “He shall stand charged or not charged, according as default or no default shall be in him.” (f)

[* 357] But if he is guilty *of gross negligence, it is no answer to say that he lost his own goods at the time he lost the goods of the bailor. (g) Thus where a coffee-house keeper took charge of a sum of money, and put it with a larger sum of money of his own into his cash-box, which he left in the public

(c) *Lethbridge v. Phillips*, 2 Stark. 544.

(d) *Giblin v. McMullen*, L. R. 2 P. C. 317; 38 L. J. P. C. 25.

(e) *Coggs v. Bernard*, 2 Raym. 913; *Lane v. Cotton*, 1 ib. 655; *Southcote's case*, 4 Co. 83 b; 1 Smith's L. C. 5th

ed. 175; Dig. lib. 16, tit. 3, 32; Domat, lex 1, tit. 7, sects. 3, 4; Dig. lib. 50, tit. 16, 223; *Jones v. Lewis*, 2 Ves. Sen. 240; *Taylor v. Caldwell*, ante, p. * 295.

(f) Doct. & Stud. c. 38.

(g) *Doorman v. Jenkins*, 2 Ad. & E. 258.

tap-room of his coffee-house, from whence it was stolen, it was held that the circumstance of his having lost his own money together with the deposit would not exculpate him from the charge of gross negligence. (*h*) Where a livery-stable keeper undertakes for reward to receive a carriage and lodge it in a coach-house, he is bound to take reasonable care that the building in which it is placed is in a proper state, so that the carriage may be reasonably safe in it; but there is no implied warranty on his part that the building is absolutely safe, and the fact that the building has been erected for him on his own ground makes no difference in his liability. (*i*) If a man takes charge of money, and leaves it upon a shelf or in an open drawer in a place of public resort, when he might have placed it under lock and key, this is a want of care inconsistent with good faith, and amounts, consequently, to gross negligence. If a package or a box, sealed or locked, be deposited, and the depositary is not made acquainted with the contents, he is bound only to take that care of the article which its general appearance seems to require; and in case it should be lost or destroyed through gross neglect, he will only be liable to the extent of the apparent value of the article, without reference to the contents. But if he is made acquainted with the contents,—if he is told that the box contains gold or jewels, glass or china, of great value,—he is then bound to exercise a degree of care proportioned to the proper keeping of such articles; and if he then exposes the box in unsafe places or subjects it to improper treatment, and the contents are damaged or destroyed, he must make compensation to the owner to the full extent of the injury sustained. (*k*) Where property is deposited with bankers gratuitously, they are only liable for gross negligence. (*kk*) An executor stands in the position of a gratuitous bailee in respect of the assets. (*l*)

Passengers' Luggage deposited in Cloak-rooms.—In the absence of any condition limiting their liability, railway companies

(*h*) *Doorman v. Jenkins*, 2 Ad. & E. 258; 4 N. & M. 170. tinue, 59; Erst. Inst. B. 3, tit. 1, sect. 27, p. 493; Domat, dep. 1, 17; Dig. lib.

(*i*) *Searle v. Laverick*, L. R. 9 Q. B. 122. 16, lex 1, sect. 41.

(*kk*) *Giblin v. M'Mullen*, L. R. 2

(*k*) *Bonion's case*, Pasch. 8 Edw. II.; P. C. 317.

Mayn. Year Book, 275; *Fitz. Abr. De-* (*l*) *Job v. Job*, 6 Ch. D. 562.

are ordinary warehousemen of luggage deposited with them; but the companies almost always give a ticket where passengers' luggage is deposited in a cloak-room, and this ticket [* 358] contains the terms of *the contract of bailment. Before the company can rely upon these terms they must be shown to have been present to the mind of the depositor, or that he had reasonable notice of their existence. (*m*)

Carelessness on the Part of the Depositor in selecting a Person notoriously unfit to be trusted.—The law, however, expects a depositor to exercise a reasonable amount of vigilance in the protection of his own interests; and if he will blindly deposit goods in the hands of a person of weak intellect, or a child, or a minor without experience, or a notoriously idle and careless or drunken fellow, he cannot expect the same care from them as from a prudent and cautious housekeeper. If the goods are injured or lost by the gross negligence of such depositaries, he must bear the consequence of his own rashness and folly, and put up with the loss. (*n*)

Theft by the Servant of the Depositary.—If a servant steps out of the course of his employment to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger. Thus if I employ a servant to work in my house, and he carries off the property of a visitor or guest, I am not answerable for the loss. “If one man desire to lodge with another that is no common hostler, and one that is servant to him that he lodgeth with robbeth his chamber, the master shall not be charged with the robbery.” (*o*) If the servant of the depositary negligently leaves the door of a house or warehouse open, and thieves avail themselves of the opportunity thus afforded them to enter the house and steal the deposit, the depositary is not responsible for the theft. (*p*) It is laid down by Holt, C. J., that “no master is chargeable with the acts of his

(*m*) *Parker v. S. E. Ry.*, 2 C. P. D. 416; *Henderson v. Stevenson*, L. R. 2 Sc. Ap. Cas. 470; *Harris v. Gt. Western Ry.*, 1 Q. B. D. 515; *Burke v. S. E. Ry. Co.*, 5 C. P. D. 1.

(*n*) “*Quia, qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare.*”—*Bract*.

lib. 3, 99 b; *Inst. lib. 3, tit. 16, sect. 3*; *Dig. lib. 16, tit. 3, 32*; *Holt, C. J., Coggs v. Bernard*, 2 Raym. 914, 915.

(*o*) *Doct. & Stud. c. 42*; *Gayford v. Nicholls*, 9 Exch. 702.

(*p*) *Dansey v. Richardson*, 3 Ell. & Bl. 169.

servant, but when he acts in execution of the authority given by his master; and then the act of the servant is the act of the master." (q) If, therefore, a servant "quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such act." (r) It is the custom of bankers to receive and keep for the accommodation of their customers boxes of plate and jewels, wills, deeds, and securities; and as no charge is made for the keeping of these things, they are as we have seen, gratuitous deposits. The bankers, therefore, are not bound to take even ordinary care of * them, and if they are stolen by a clerk [* 359] or servant employed about the bank, the bankers are not responsible, unless they have knowingly hired or kept in their service a dishonest servant. Where a large quantity of doubloons locked up in a chest was deposited in the vaults of an American bank, and the bankers, who received the chest to keep as depositaries without reward, gave the owner a receipt acknowledging that the chest had been "left at the bank for safe keeping," and a clerk in the bank opened the chest and abstracted 32,000 doubloons and then absconded, having also robbed and defrauded the bank, it was held by the American court that the bankers were not responsible for the theft. (s)

Of the Use and Enjoyment by the Depositary of the Subject-Matter of the Deposit. — A depositary has no right to make use of the deposit for his own benefit and advantage; if he does so, and the thing is lost or injured, or deteriorated in value, through such user, the depositary must make good the loss. (t) If, however, the subject-matter of the bailment is a living animal, such as a hound or a horse, which requires air and exercise, the bailee has an implied authority from the owner to use it to a reasonable extent, and as under an implied engagement to give it proper air

(q) *Middleton v. Fowler*, 1 Salk. 479; *Giblin v. McMullen*, L. R. 2 P. C. 282. 318; 38 L. J. P. C. 25; *ante*, p. *356.

(r) *Lord Kenyon, M'Manus v. Crickett*, 1 East, 107; *Reedie v. Lond. & North West. Ry. Co.*, 4 Exch. 244; *Peachey v. Rowland*, 13 C. B. 182.

(s) *Foster v. Essex Bank*, 17 Massach. lib. 16, tit. 3, 29.

and exercise. If a sum of money is bailed by one man to another under circumstances fairly leading to the presumption that the bailee has authority from the bailor to use it or not as he may think fit, the bailee will stand in the position of a mere depositary, or he will be clothed with the increased duties and liabilities of a borrower, according as he may or may not have thought fit to avail himself of the privilege of user impliedly accorded to him. If he puts the money into a coffer or bag, and refrains from using it, and so preserves its identity, with the intention of restoring it *in individuo* to the bailor, he undertakes the duty of a mere depositary, (u) and is bound only to take the same care of the deposit that he is in the habit of bestowing upon his own money, and will not be responsible for loss by robbery, fire, or any other casualty. But if he were to mix the sum deposited with his own money with the intention of restoring an equivalent, and so to destroy the identity and individuality of the subject-matter of the bailment, this would be a user of the money which would at once alter the nature and character of the bailment, converting it into a loan for use and consumption, with its increased duties and responsibilities. (x) Where corn [* 360] was deposited by a farmer with *a miller, to be used as part of the miller's current consumable stock, subject to the right of the farmer to claim at any time an equal quantity of wheat of similar quality, or, in lieu thereof, the market price of such quantity, it was held that this was a sale, and not a bailment. (y)

Transfer of the Deposit to a Stranger — Remedy of the Depositor.

— If a depositary commits a breach of trust, and sells or wastes the deposit, the depositor may maintain an action against the purchaser for the recovery of the value of the deposit if the latter neglects to yield it up on demand, (z) unless the thing has been purchased in market overt (Add. on Torts 5th ed. (by Cave), p. 415). If the goods are bailed by A to B, to be kept by the latter, and B bails them to C, who uses and wastes the goods, C

(u) Dig. lib. 16, tit. 3, 1, sect. 34.

(x) Dig. lib. 12, tit. 1, 4; Inst. lib. 3, tit. 15, sect. 2.

(y) South Australian Ins. Co. v. Randall, L. R. 3 C. P. 101.

(z) Cooper v. Willomat, 1 C. B. 672;

Fenn v. Bittlestone, 7 Exch. 159; White v. Spettigue, 13 M. & W. 603.

is liable to an action at the suit of A for the recovery of compensation for the damages sustained. (a) Where a depositary has wrongfully sold the goods deposited with him, the bailor may sue him immediately for the conversion. If he does not discover the conversion until after the lapse of six years, he is, nevertheless, entitled to sue the depositary for refusing to deliver up the goods, and the statute of limitations will run only from the refusal to deliver on request, and not from the sale. (b)

Restoration of the Deposit. — The depositary is bound to deliver up the deposit to the owner on demand, although the latter may be an entire stranger to him. Where a pony-chaise was bailed to a workman to be painted, and the latter deposited it in the hands of a party who refused to deliver it up to the owner unless the latter produced either the person who actually deposited the chaise in his hands or an order from him for its delivery, it was held that the owner was entitled to the possession of his property without doing either the one or the other. (c) The bailee has no better title than the bailor; and consequently if a person entitled to the property as against the bailor claims it, the bailee must give it up to him. (d)

Joint and Several Deposits. — Where goods and chattels are deposited in the hands of a bailee by the concurring will of several joint owners, one of them has no right to demand them back without the authority of all the joint depositors. If some of them ask the bailee to return the property, and others desire him to keep it, the bailee is not liable to an action at the suit of those who require him to return it. (e) If goods and chattels, deeds or securities * are deposited by two persons [* 361] jointly in the hands of a third to be kept, it is not in the power of one of them alone, without the concurrence of the other, to take them out of the hands of the bailee. (f) If the bailee is bound by his contract to deliver the goods to the two

(a) 12 Ed. IV. fol. 13, pl. 9; fol. 9, pl. 5; *Loeschman v. Machin*, 2 Stark. R. 7 Q. B. 594. See, however, *Ex parte Davies*, 19 Ch. D. 86, *post*, p. * 467.

311. (b) *Wilkinson v. Verity*, L. R. 6 C. P. 206; 40 L. J. C. P. 141. (c) *Attwood v. Ernest*, 13 C. B. 889; 22 L. J. C. P. 225.

(d) *Buxton v. Baughan*, 6 C. & P. 674. (e) *May v. Harvey*, 13 East, 197; Thel. Dig. lib. 11, cap. 47; *Jones's Bailments*, 50; *Noy's Life*, appended to

(f) *Biddle v. Bond*, 6 B. & S. 25; 34 L. J. Q. B. 137; *Batut v. Hartley*, L. Noy's Maxims, 8th edit. 1821.

jointly, his refusal to deliver them on the demand of one party alone is not a conversion, nor is his detention from such one party an unlawful detainer. But if an action is brought by several joint bailors against the bailee for non-delivery of the goods, it is a good defence to the action that the goods have been delivered up to one of them. (*g*) When the deposit is not a joint deposit founded on a joint contract, but is made by one of several joint owners, the depositor may sue alone, "as if a charter be made to four, and one of them bails the charter to keep, he alone, without the others, may bring detinue." (*h*) And wherever several joint owners allow one of them to deal with their property, and place it in the hands of a bailee, the latter is accountable to the owner with whom he deals. (*i*)

Transfers of the Subject-Matter of the Bailment — Adverse Claimants. — When chattels have been bailed, to be holden by the bailee at the disposal of the bailor, a question often arises as to the nature and extent of the liabilities of the bailee to persons who claim to be the owners of the chattels by sale or mortgage from the bailor. If the bailee has received the chattels upon the terms that he is to deliver them to the bailor, or to any person authorized by him to receive them, a *bona fide* purchaser or mortgagee who is in possession of a bill of sale or assignment, or mortgage, executed by the bailor, transferring all the bailor's interest in the chattels to such purchaser or mortgagee, may, on presenting such bill of sale or mortgage to the bailee, lawfully demand possession of the chattels, and in case of the refusal of the latter to deliver them to him, may maintain an action for their recovery, the bill of sale or mortgage signed by the bailor being an authority or direction to the bailee to deliver up the chattels to the purchaser or mortgagee.

Eviction by Title Paramount. — Where the plaintiff brought an action against the defendant for a breach of his promise to return a horse sent to him by the plaintiff, and the defence was that S was the owner of the horse and had forcibly taken it away from

(*g*) *Burke v. Bryant*, Addison on Torts, p. 350; *Brandon v. Scott*, 7 Ell. & Bl. 237; 26 L. J. Q. B. 163; *Watson v. Evans*, 1 H. & C. 664; 32 L. J. Ex. 137.

(*h*) Thel. Dig. lib. 11, cap. 47, sect. 8; *Broadbent v. Ledward*, 11 Ad. & E. 211.

(*i*) *Martin, B., Walshe v. Provan*, 8 Exch. 852.

the defendant, it was held that this was a discharge of the * defendant's promise, it being analogous to an eviction of a lessee by title paramount. (*k*) So where a bailor mortgages a chattel bailed, and the mortgagee has a right to demand possession from the bailee, and does demand it, the latter may refuse to give the chattel up to the bailor. (*l*)

Stakes in the Hands of Stakeholders to abide the Event of a Lawful Game. — If money has been deposited in the hands of a stakeholder to abide the event of a lawful game or race, and then to be paid over to the winner, the stakeholder holds the money as agent of the winner, and is bound on demand to pay it over to him. (*m*) But if the party is not strictly a stakeholder holding money in that character, but receives it as agent for a known principal, he is accountable only to the latter for the money. (*n*) If the deposit has been made by two persons jointly, it cannot, as we have seen, be revoked and the thing deposited be demanded back by one of them alone. If a valid and binding contract is made between A and B for the performance of some act or duty by B by an appointed day, or within a reasonable time after the making of the contract, and for the payment of money by A to B on the act being done, and the sum to be paid is by the mutual agreement of the parties, deposited by A in the hands of C, to be paid over to B on the performance of his contract, and in default to be returned to A, the deposit cannot be revoked and the money demanded back from the stakeholder by A without the consent of B, (*o*) unless the transaction is illegal. (*p*) As soon as the stakeholder has received the deposit, he is bound to hold it to abide the event, and must not pay it over to either party until the condition upon which it was made payable or returnable has been accomplished. Thus where an auctioneer has received a deposit from the purchaser of an estate,

(*k*) *Shelbury v. Scotsford*, Yelv. 23; *Littleale, J., Wilson v. Anderson*, 1 B. & Ad. 457; *Biddle v. Bond*, 34 L. J. Q. B. 137; 6 B. & S. 225. See, however, *Ex parte Davies*, *post*, p. * 467.

(*l*) *European & Australian Royal Mail Co. v. Royal Mail Steam Packet Co.*, 30 L. J. C. P. 247.

(*m*) *Applegarth v. Colley*, 10 M. & W. 733.

(*n*) *Bamford v. Shuttleworth*, 11 Ad. & E. 926; *Edgell v. Day*, L. R. 1 C. P. 80; 35 L. J. C. P. 7.

(*o*) *Marryat v. Broderick*, 2 M. & W. 372; *Emery v. Richards*, 14 M. & W. 728; 15 L. J. Ex. 49.

(*p*) *Ante*, p. * 223; *Eltham v. Kingman*, 1 B. & Ald. 683.

to be paid over to the vendor if a good title to the property is made out by the latter and in default thereof to be returned to the intended purchaser, the latter has no right to demand back the deposit, and the auctioneer is not justified in returning it, without the consent of the vendor. But if the vendor is not able to establish his title, or the contract is rescinded or abandoned by the mutual consent of the contracting parties, the auctioneer then holds the deposit for the use and at the disposal of the party from whom he received it, and is [* 363] bound * to return it on the request of the latter. (g) So long as the contract between the parties interested in the deposit remains open, and the event is undetermined, the right to the deposit remains in suspension, and each of the parties has an equal interest in the due fulfilment of the trust by the stakeholder. Stewards of a horse-race do not stand in the position of arbitrators between the persons who have horses in the race; and it is not necessary that they should meet together and come to a joint decision as to which horse has won, to enable the winner to recover the stakes. (r)

If the deposit has been made to abide the event of a wager, or for the purpose of carrying into effect an unlawful transaction, the depositor may, as we shall see, at any time before the event has happened or the deposit has been paid over, demand it back and maintain an action for its recovery. (s)

Power of the Depositary to compel Rival Claimants to establish their Title by Interpleader.—If the event, when it does transpire, is not of a decisive character, and both parties set up a title to the deposit, the depositary may compel them to interplead, and so establish the right. This may be done when the depositary claims no interest in the deposit, and is not colluding with either party. (t) A stakeholder may also pay money into court under the Trustee Relief Act. (u)

(g) *Burrough v. Skinner*, 5 Burr. 2639; *Edwards v. Hodding*, 5 Taunt. 815; *Gray v. Gutteridge*, 1 M. & R. 614; *Duncan v. Cafe*, 2 M. & W. 246.

(r) *Parr v. Winteringham*, 1 Ell. & Ell. 394; 28 L. J. Q. B. 123.

(s) *Post*, p. *1156; *Holmes v. Sixsmith*, 7 Exch. 802; 21 L. J. Ex. 312.

(t) *Crawshay v. Thornton*, 7 Sim.

398; *Pearson v. Cardon*. 2 Russ. & M. 606; *Tanner v. The European Bank*, L. R. 1 Ex. 261; 35 L. J. Ex. 151; *Nelson v. Baxter*, 23 L. J. Ch. 705; 2 H. & M. 334; *Attenborough v. St. Katherine's Dock*, 3 C. P. D. 450, C. A.; 23 & 24 Vict. c. 126, sect. 12.

(u) *United Kingdom Life Assurance Co., In re*, 34 L. J. Ch. 554.

Liabilities of the Depositary when he holds Possession wrongfully. — If the depositary is in default in neglecting to return the chattel on demand, he is responsible for the subsequent loss or destruction of the article, and for all injuries that may afterward happen to it, by whatever means occasioned. He must restore it, moreover, with all its increase and profits. Thus, he who has taken charge of a flock of sheep must restore the wool shorn from their backs and the lambs they have produced, together with the sheep themselves; and if the profits, produce, and increase are of a perishable nature, such as milk, eggs, and butter, and have been necessarily sold, the produce of the sale must be paid to the depositor. The depositary, however, cannot be called upon to deliver up the accessory without the principal. If the depositor turns out to be a thief and to have stolen the things deposited, and the true owner appears, the depositary must restore them to the latter. (x)

* **Liabilities resulting from the taking Possession of [*364] Goods by Finding.** — A man may clothe himself with the ordinary obligations and liabilities of a depositary by finding and taking possession of the lost property of another as well as by receiving property direct from the hands of the owner. In Noy's Maxims it is observed (c. 43): "If one man finds goods of another, and they be hurt or lost by the negligence of him who found them, he shall be liable to make them good to the owner." So in Doctor and Student it is said: "If one man finds goods of another, and they be after hurt or lost by wilful negligence, he shall be charged to the owner. But if they be lost by other casualty, as if they be laid in a house that by chance is burned, or if he deliver them to another to keep that runneth away with them, I think he be discharged." (y) "When a man doth find goods," further observes Lord Coke, "it has been said, and so commonly held, that if he doth dispossess himself of them, by this he shall be discharged; but this is not so, as appears by the 12 Edw. IV. fo. 13. For he who finds goods is bound to answer for them to him who hath the property; and if he deliver them over to any one, unless it be to the right owner, he

(x) Domat (*Du Depot*), sect. 4, sect. 2; sect. 1, sect. 5; Dig. lib. 16, tit. 3.

(y) Dial. 2, c. 38; Story, 64, 65.

shall be charged for them ; for at the first it is in his election whether he will take them or not into his custody ; but when he hath them, he ought to keep them safely ; and if he be wise, he will search out the right owner of them, and deliver them to him. An action on the case lieth against him for ill and negligent keeping." (z) So by the civil law, if the finder of a lost article took the thing lost into his possession, he was obliged to take care of it and preserve it for the owner. He was deemed, moreover, to be guilty of a theft if he made no attempt to discover the owner and restore the lost property, or if, knowing the owner, he kept the property without any intention to restore it. (a)

Liabilities of the Depositor. — The depositor is by the Roman law bound to reimburse the bailee all extraordinary expenses incurred by him in the preservation of the thing committed to his keeping ; and such a liability may, under certain circumstances, exist in our own law. The French law, moreover, concedes to the depositary a right to detain the chattel until he has received payment of such expenses. (b) But no such right exists in the common law ; and no depositary is ever permitted in this country to set up a right of lien upon the chattel for the mere expenses he has incurred in keeping and preserving it.

Deposits of Money with One of Several Partners. — A [*365] receipt of * money by one partner on account of the firm, in the ordinary course of the business of the co-partnership, is the receipt of the co-partnership at large ; and all the partners are individually responsible for the proper application of the money deposited. (c) If two solicitors in partnership together are in the habit of receiving money to place out on securities, and one of them receives a sum of money to be laid out on security, the other is responsible for the proper application of the money, although the party receiving it gives his own separate receipt for it, making himself individually accountable for the amount on demand. (d) But it must be proved that the

(z) *Izaack v. Clark*, 2 Bulst. 312.

(c) *Dundonald v. Masterman*, L. R.

(a) Dig. lib. 47, tit. 2, lex 43, sect. 4. As to recovering the halves of bank-notes, see *Smith v. Mundy*, 29 L. J. (Q. B.) 172.

7 Eq. 504; 38 L. J. Ch. 350; *St. Aubyn v. Smart*, L. R. 3 Ch. 646.

(b) *Pothier (Depot)*, No. 59; (*Objections*) No. 625; Cod. Civ. art. 1948.

(d) *Willet v. Chambers*, 2 Cowp. 814.

client relied on the joint judgment and joint security of the firm, and that it was part of the ordinary course of business of the firm to receive and hold money until a good mortgage security offered, and then invest it; for it is no part of the ordinary business or duties of solicitors to receive and hold money for general purposes of investment. (e) Where one of a firm of solicitors received from a client a sum of money, for which a receipt was given in the name of the firm, stating that part of the money was in payment of certain costs due to the firm, and that the residue was to make arrangements with the client's creditors, and the solicitor misappropriated the money, it was held that the transaction with the client was within the scope of the partnership business, and that the partners in the firm were jointly and severally liable to make good the amount. (f) If one of several partners in trade obtains money in the ordinary course of dealing of the co-partnership, but by means of false and fraudulent representations, and converts the money, when received, to his own use in fraud of his partners, the partnership is nevertheless responsible for the moneys so received in the name of the firm; and an innocent partner may, consequently, be as much bound by such fraudulent acts and transactions as if he himself had personally been a party to them. (g) But if the fraud has not been committed in the course of the partnership dealings, but in the private and separate transactions of the single partner himself with third parties, the innocent partner cannot be made responsible to those who have been defrauded in the course of such transactions. Thus, if a partner who holds money in his hands as a trustee for third parties brings that money into the partnership account, and * employs it in the [*366] business as his own money, the other partners cannot be made responsible for the repayment of the money so employed in the business, unless they knew at the time that the money was trust money, and not the property of their co-partner. (h)

(e) *Harman v. Johnson*, 2 Ell. & Bl. 61; 22 L. J. Q. B. 297; *Plumer v. Gregory*, L. R. 18 Eq. 621; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394; and see *post*, p. * 379.

(f) *Atkinson v. Macreth*, L. R. 2 Eq. 570; 35 L. J. Ch. 624.

(g) *Rapp v. Latham*, 2 B. & Ald. 795; *Stone v. Marsh*, R. & M. 368; 6 B. & C. 551; *Keating v. Marsh*, 1 Mont. & Ayr. 582.

(h) *Ex parte Heaton*, Buck, 386; *Smith v. Jameson*, 5 T. R. 601.

But if money is deposited in the hands of one of several partners of a banking firm at the bank, to be held temporarily by the bank, and subsequently applied in the purchase of some particular security, and the partner absconds with the money, the firm is responsible for the repayment of the amount, although they had given no authority to their partner to receive money for investment, and the transaction, so far as it related to the application of the money when received, was not in the ordinary course of business. (*i*) And where the senior partner of a firm of stockbrokers bought transferable bonds for the plaintiff, and kept the bonds for him, and afterward sold them and made away with the money, it was held that the firm was responsible to the plaintiffs for the value of the bonds, although the junior partners were entirely ignorant of the transaction. (*k*)

Deposits of Money with Bankers.¹ — Money deposited in the hands of bankers in the ordinary course of business is money lent to the banker by the depositor, with a superadded obligation that it is to be repaid when called for by cheque. If interest is to be paid by the banker, the transaction amounts to a letting and hiring of the money or a loan at interest; if no interest is to be paid on the deposit, it is a *commodatum* or gratuitous loan; and in this last case, if the money remains for six years in the banker's hands without any payment by him of any part of the principal, or any acknowledgment by him in writing of the existence of the loan and of the debt, the statute of limitations will be a bar to its recovery by action. (*l*) In ordinary cases of deposits of money with bankers, the transaction amounts to a *mutuum* or loan for use and consumption, it being understood that the banker is to have the use of the money in return for his consent to take charge of it. (*m*) "Money, when paid

¹ See Morse, Banks; Ball, Nat. Banks; Thompson & Browne's Nat. Bank Cases; Abb. Dig. Corp. tit. *Banks*, V. 3; U. S. Dig. tit. *Banking*, I. 2.

Bank liable for loss of depositor's money through embezzlement, fraud, &c., of cashier or other officers. *Steckel v. First Nat. Bank*, 93 Pa. St. 376; *Ziegler v. Same*, ib. 393; *Resh v. Same*, ib. 397.

(*i*) *Thompson v. Bell*, 10 Exch. 10; 16 L. J. Ex. 210; *Howard v. Danbury*, 223 L. J. Ex. 321. C. B. 806.

(*k*) *La Marquise de Ribeyre v. Barclay*, 23 Beav. 125; 26 L. J. Ch. 747. (*m*) *Alderson, B., Roberts v. Tucker*, 16 Q. B. 575; *Pott v. Clegg*, 16 M. & W.

(*l*) *Pott v. Clegg*, 16 M. & W. 321; 321; 16 L. J. Ex. 210; *Sims v. Bond*, 2 N. & M. 608.

into a bank, ceases altogether to be the money of the depositor; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it or ordered to pay it. It is the banker's money; he deals with it as his own; he makes what profit he * can of it, which profit he retains to himself, [*367] paying back only the principal sum, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places." The money, therefore, being his own, he is guilty of no breach of trust in employing it. He is not answerable to the principal if he puts it in jeopardy by engaging in hazardous speculations; but he is, of course, answerable for an equivalent amount to be paid to his customer when demanded. (n)

Deposit of Bills, Notes, and Securities in the Hands of Bankers.¹

—But bills deposited in the hands of a banker remain the

¹ Upon special deposits (or those which require the specific thing to be returned) with banks, see Morse, *Bank*, (2d ed.) 66-72; Edwards, *Bailments*, 41-50; Schouler, *Bailments*, 35-39; Ball, *Nat. Banks*, 111, 229; Story, *Bailments*, sect. 88, and 41 note; U. S. Dig. tit. *Banking*, sects. 46-104.

A national bank has the power to receive and become bound for special deposits. *National Bank v. Graham*, 100 U. S. 699. Earlier decisions on both sides of the question were: *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Wiley v. First Nat. Bank*, 47 Vt. 546; *Whitney v. First Nat. Bank*, 50 Vt. 388; *Marine Bank v. Chandler*, 27 Ill. 525; *Turner v. First Nat. Bank*, 26 Iowa, 562; *Scott v. National Bank*, 72 Pa. St. 471; *Lancaster County Nat. Bank v. Smith*, 62 Pa. St. 47.

Like any other gratuitous bailee, a bank receiving a special deposit without charge is liable only for gross negligence. *National Bank v. Graham*, 100 U. S. 699; *S. C. Browne, Nat. Bank Cas.* 64, and see note, *ib.* 69; *First Nat. Bank v. Rex*, 89 Pa. St. 308; *De Haven v. Kensington Nat. Bank*, 81 Pa. St. 95; *Scott v. National Bank*, 72 Pa. St. 471; *Comp v. Carlisle Deposit Bank*, 94 Pa. St. 409; *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369; *Ray v. Bank of Ky.*, 10 Bush, 344; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Scott v. Crews*, 2 S. C. 522; *Maury v. Coyle*, 34 Md. 235.

Its liability where the property is pledged to the bank as collateral security, see *Dearbourn v. Union Nat. Bank*, 58 Me. 273; s. c. 61 *ib.* 369; *Jenkins v. National Village Bank*, 58 Me. 275; and see *Third Nat. Bank v. Boyd*, 44 Md. 47; *Fleming v. Northampton Nat. Bank*, 62 How. Pr. 177.

Where the cashier pledges bonds deposited for safe-keeping, the pledgee in good faith acquires a good title, and a recovery of the bonds through the cashier's

(n) *Foley v. Hill*, 2 H. L. C. 36; *ante*, p. *346.

property of the customer, unless there be a special agreement transferring the property in them to the banker, so that upon the death or failure of the banker the customer has a right to the bills so long as they remain *in specie*, but the banker has a lien upon them if the customer has overdrawn his account (*post*, p.* 375). Where a customer was in the habit of depositing bills with his bankers, which bills were indorsed by him, and were entered in the bank books to his credit as *bills*, not as cash, and after such entry the customer was allowed to draw to the full amount of such bills by cheques, and the bankers became bankrupt, it was held that the customer, who had a cash balance in his favor at the time of the bankruptcy, was entitled to the bills, there being no evidence that he had agreed that, when the bills were deposited, they were to become the property of the bankers. (*o*) And where a customer paid a bank-note into the bank after the ordinary hours of business, and the bankers, having previously resolved to stop payment, did not carry the amount of the note to the customer's account, but placed it aside in a separate place of deposit, taking care not to mix it with the general assets of the house, it was held that the note still remained the property of the customer. (*p*) If bank-notes deposited by a customer turn out to be worthless paper, by reason of the insolvency of the bank which issued the notes, the loss falls upon the customer, if there has been no laches on the part of the banker with whom the notes were deposited. If the banker gives a receipt for the notes as cash, he is not

bad faith does not revest the title in the depositor. *Ringling v. Kohn*, 4 Mo. App. 59.

Depreciation in the value of bills or notes constituting a special deposit does not alter the rights of the parties. *Dawson v. Real Estate Bank*, 5 Ark. 283; *Green v. Sizer*, 40 Miss. 530; *Maynard v. Newman*, 1 Nev. 271; see *Foster v. Bank*, 21 La. Ann. 333; *Kupfer v. Bank of Galena*, 34 Ill. 328; *Bank of the State v. Burton*, 27 Ind. 426; *Gumbel v. Abrams*, 20 La. Ann. 568; *Chesapeake Bank v. Swain*, 29 Md. 483; *Sandford v. Hays*, 52 Pa. St. 26; *Warner v. Sauk County Bank*, 20 Wis. 492.

See, further, *Smith v. First Nat. Bank*, 99 Mass. 605; *Griffith v. Zipperwick*, 28 Ohio St. 388; *Wright v. Paine*, 62 Ala. 340; *Danville Bank v. Waddill*, 31 Gratt. 469.

(*o*) *Thompson v. Giles*, 3 D. & R. 733; 2 B. & C. 422.

(*p*) *Sadler v. Belcher*, 2 Mood. & Rob. 489; *ante*, p. * 366; *post*, p. * 369.

precluded by such receipt from subsequently showing that what he received was not cash, but spurious paper. (*q*)

Receipt of Cheques by Bankers on Account of their Customers.

— When a cheque is paid into a bank to be placed to the account of a * customer, the banker is bound to use [*368] due diligence in getting the cheque paid, and must give prompt notice to his customer in case it is not paid; and if he omits to do either of these things, he makes the cheque his own, and must bear the loss, if loss there be. Where the plaintiff received a cheque drawn upon his own bankers, and took it to their bank, and handed it to a clerk, with directions to place it to his account, and the clerk received the cheque without any observation, and the bankers, finding that the drawer of the cheque had overdrawn his account and was keeping out of the way, gave the plaintiff notice on the following day that the cheque would not be honored by them, and that the amount of it would not be placed to his credit, it was held that the bankers were not precluded, by their having received the cheque without comment in the first instance, from subsequently refusing to credit the plaintiff with the amount; but that if the plaintiff, at the time he deposited the cheque, had asked the bankers whether they would pay it, he would have been entitled to an answer, and that the bankers would have been bound by such answer. (*r*) It is often impossible to ascertain till the close of the day at the clearing-house what sums of money may be paid in to each particular account, and what are the drafts upon it; and bankers, therefore, may receive cheques drawn upon them by their customers, and may reserve to themselves the right of honoring them, or not honoring them, according to the result of the day's transactions at the clearing-house. Where bankers, at the time of receiving a cheque drawn upon them by one customer and presented by another, stated that they were not then in funds, but that they would keep the cheque in the hope of being furnished with money to pay it in the course of the day, it was held that they were bound to appropriate the first money they

(*q*) *Timmins v. Gibbins*, 18 Q. B. 722; 21 L. J. Q. B. 403.

(*r*) *Boyd v. Emmerson*, 2 Ad. & E. 202.

received from their customer to the drawer, in satisfaction and discharge of such cheque. (s)

Of the Duty of Bankers to honor the Drafts of their Customers — Payment of Cheques.¹— It is the duty of the banker to pay the debt due to the customer pursuant to the order, cheque,

¹ See Morse, Banks (2d ed.), 249-383; Ball, Nat. Banks, 66; U. S. Dig. tit. *Banking*, sect. 137.

In order that a writing should be a cheque, a payee must be indicated. *McIntosh v. Lytle*, 26 Minn. 336.

After a cheque has passed to a holder in good faith, the drawer has no power to countermand it. *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212; *Weinstock v. Bellwood*, 12 Bush, 139.

A bank, after having paid a cheque from funds of the drawer, cannot at his request rescind its act to the prejudice of those who have in good faith acted upon the credit of the cheque. *Albers v. Commercial Bank*, 9 Mo. App. 59.

When the drawer of a cheque has no funds at the time in the bank to meet it, the cheque is due immediately, without presentment and demand, and the statute of limitations begins to run from its date. *Brush v. Barrett*, 82 N. Y. 400.

As to delay in the presentment of a cheque, see *Fletcher v. Pierson*, 69 Ind. 281; *Allen v. Kramer*, 2 Ill. App. 205; *Cowing v. Altman*, 79 N. Y. 167; *First Nat. Bank v. Alexander*, 84 N. C. 30; *Springfield v. Green*, 7 Baxt. 301; *Schoolfield v. Moon*, 9 Heisk. 171; *Kinyon v. Stanton*, 44 Wis. 479; and compare *State v. Bætz*, ib. 624.

As to what constitutes an acceptance, see *National Bank v. Second Nat. Bank*, 69 Ind. 479. The drawer's liability is not affected by the fact that when the drawee accepted the cheque all the parties knew that the bank had suspended, and that the drawer had funds therein to an amount greater than that of the cheque. *American Emigrant Co. v. Clark*, 47 Iowa, 671.

The holder of a cheque need not present it after the insolvency of the drawee. *Jackson Ins. Co. v. Sturges*, 12 Heisk. 339. The drawers of a cheque are not released from liability by the holder's failure to notify them of non-payment, the drawers being found to have no funds in bank at the time of the presentation of the cheque. *Shaffer v. Maddox*, 9 Neb. 205; see also *Henshaw v. Root*, 60 Ind. 220.

The drawer of a cheque, after demand upon the drawee for payment, and a refusal, is not discharged because of a failure to present the cheque at the clearing-house, in accordance with the mercantile usage, although, had it been so presented, it would have been paid. *Kleekamp v. Meyer*, 5 Mo. App. 444.

To have the effect of an equitable assignment, an order, cheque, or draft must be drawn on a particular specified fund; and this notwithstanding a receipt on the back of the cheque intended for the signature of the payee. *Attorney-General v. Continental Life Ins. Co.*, 71 N. Y. 325. A post-dated cheque is not invalid. *Frazier v. Trow's Printing, &c. Co.*, 24 Hun, 281.

For the limits of the obligation of banks to pay a depositor's cheques and notes drawn payable at bank, see an article, *Notes payable at Bank*, 12 West. Jur. 523, 17 Alb. L. J. 500.

See, further, *Deener v. Brown*, 1 MacArthur, 350; *Bristol Knife Co. v. First*

(s) *Kilsby v. Williams*, 5 B. & Ald. 819.

or draft of the latter. The customer may order the debt to be paid to himself or anybody else, or he may order it to be carried over or transferred from his own account to the account of any other person he pleases. He may do so by written instrument or verbal direction; but the banker is entitled to require some written evidence of the order for the transfer. (*t*) The banker is bound by law to honor the cheques and drafts of his customers, provided they are *presented within [*369] banking hours, and provided he has in his hands sufficient funds for the purpose belonging to the customer; (*u*) and if he refuses he is liable to an action by the customer for substantial damages without proof of actual damage; for it is a discredit to the customer to have his cheque refused payment. (*x*) Where the plaintiff paid a sum of money to a banker in London, and directed him to forward the money to certain country bankers to the plaintiff's credit by a particular day, and the London banker received the money and neglected to forward it, it was held that he was responsible for all damages sustained by the plaintiff by reason of his not having the money at the time and place appointed. (*y*) The acceptance by a customer of a bill of exchange payable at his bankers is tantamount to an order from him to his banker to pay the bill to the person who, according to the law merchant, is capable of giving a good discharge for it, *i. e.* to a person who becomes the holder by a genuine indorsement, or if the bill is originally payable to bearer, or if there is afterward a genuine indorsement in

Nat. Bank, 41 Conn. 421; Cutler *v.* Reynolds, 64 Ill. 321; Emery *v.* Hobson, 63 Me. 32; Magee Furnace Co. *v.* Boston Soapstone Furnace Co., 124 Mass. 409; Carr *v.* National Security Bank, 107 Mass. 45; Senter *v.* Continental Bank, 7 Mo. App. 532; Frankenberg *v.* First Nat. Bank, 33 Mich. 46; Shipsey *v.* Bowers Nat. Bank, 59 N. Y. 485; Briggs *v.* Central Bank, 61 How. Pr. 250; Boyden *v.* Bank of Cape Fear, 65 N. C. 13; Terry *v.* Ragsdale, 33 Gratt. 342; Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367; Hunter *v.* Wetsell, *ib.* 549; Munger *v.* Albany City Nat. Bank, 85 N. Y. 580.

(*t*) Watts *v.* Christie, 11 Beav. 546; Eng., 1 C. M. & R. 744; Cumming *v.* Shand, 5 H. & N. 95; 29 L. J. Ex. 129.

(*u*) Agra Bank, &c. *v.* Hoffman, 34 L. J. Ch. 285. As to orders on bankers operating by way of *Novation and Substitution*, see *post*, p. *1229.

(*v*) Marzetti *v.* Williams, 1 B. & Ad. 424; Rolin *v.* Steward, 14 C. B. 595; (y) Shillibeer *v.* Glynn, 2 M. & W. 143; Wheatley *v.* Low, Cro. Jac. 668; 23 L. J. C. P. 148; Boyd *v.* Emmerson, 2 Ad. & E. 184; Whitaker *v.* Bank of Loe's case, Palm. 281.

blank, to the person who seems to be the holder. (z) If bankers have indorsed a bill of exchange accepted by a customer, and the bill is presented to them when it arrives at maturity, and they pay it on the day it becomes due, the bankers so paying may reserve to themselves the right to examine into the state of the accounts between them and the acceptor, their customer, and determine whether they honor the bill for the acceptor, or take it up on their own account as indorsers. (a) As to determination of authority of bankers, see sect. 75 of Bills of Exchange Act in Appendix.

Payment of Cheques under Suspicious Circumstances — Negligence. — If bankers pay a cheque under circumstances of suspicion which ought to have put them on their guard and induced them to make inquiry before paying it, they cannot debit the customer with the amount, if the cheque was never uttered or put into circulation by the customer. Thus where the customer, finding that he had drawn a cheque for a wrong sum, tore it into four pieces and threw them away, and these four pieces were picked up and neatly pasted together, and presented at the bank by a stranger for payment, but the rents and the pasting of the paper were quite visible, and the face of the cheque was soiled and dirty, and the cashier, [*370] * nevertheless, paid it without demur or inquiry, it was held that the bankers had been guilty of a neglect of duty, and could not, under the circumstances, debit their customer with the payment. (b) But if the tearing is done in such a way that it is reasonable to presume it to have been done for the purpose of transmitting the cheque through the post, there will then be no neglect of duty on the part of those who pay the cheque in ignorance of its having been torn up with the intention of cancelling it. (c)

Joint Accounts and Joint Deposits with Bankers. — Where money is paid into a bank to the joint account of several persons *nominatim*, it cannot be drawn out by one of them alone; for the bankers are not discharged from liability by

(z) *Kymer v. Laurie*, 18 L. J. Q. B. 218; *Robarts v. Tucker*, *post*, p. *372.

(a) *Pollard v. Ogden*, 2 Ell. & Bl. 464; 22 L. J. Q. B. 439.

(b) *Scholey v. Ramsbottom*, 2 Campb. 485.

(c) *Ingham v. Primrose*, 28 L. J. C. P. 294.

payment to one of the depositors without the authority of the others. (*d*) But when one dies, the money may be drawn out by the survivor. Such is the case with money deposited in a bank in the joint names of husband and wife. (*e*)

Deposits and Accounts with Bankers in the Names of Trustees, Agents, and Receivers.¹ — In a banking account of the ordinary kind between a banker and his customers, it is not competent to any third party to interpose and to say that the customer was his agent, and that the banker has contracted with such third party through the medium of such customer, his agent. All cheques and money paid into the bank by the customer are, as between the banker and the customer, the cheques and money of the customer, whoever may be the real owner of them. If the owner of the cash allows his agent to deal with it as his own, and pay it into the bank in his own name, he has no power over it after it has reached the banker's hands. On the other hand, it is not competent to the banker, after he has placed the money to the credit of the customer, to deny the title of the latter to the money, and to set up a *jus tertii*, or to revoke the credit. (*f*) If several joint owners of a sum of money allow one of them to deal with their money and place it in the hands of a banker to his separate account, the banker must treat that as a contract with the one individual dealing with him, and the latter cannot impose upon the banker as many contracts as there are owners of the money. (*g*)

Separate Accounts opened by the Same Person in Different Capacities. — Generally, as between banker and customer, the banker looks only to the customer in respect of the account opened in that customer's name, and whatever cheques that customer chooses * to draw, the banker is to honor, [*371] and is not to inquire what the moneys are that are paid into that account, or for what purpose they are drawn out. But when the customer opens two separate accounts, the one

¹ See *National Bank v. Insurance Co.*, 104 U. S. 54.

(*d*) *Innes v. Stephenson*, 1 Mood. & Rob. 147; *Sims v. Brittain*, 4 B. & Ad. 375.

(*e*) *Williams v. Davies*, 33 L. J. P. & M. 127.

(*f*) *Tassell v. Cooper*, 9 C. B. 533.

(*g*) *Sims v. Brittain*, 4 B. & Ad. 375; *Pinto v. Santos*, 5 Taunt. 447.

being a private account of his own, and the other an account as trustee or receiver of the moneys of a known third party, the bankers are bound to take notice that the moneys placed to the last-named account are not the moneys of their customer, and they cannot make an arrangement with the latter for an appropriation of the balance in their hands on the fiduciary account to liquidate a balance due to them from their customer upon his own private account. They have no right to combine with the receiver for the appropriation of his principal's money to discharge the private debt due to them from the receiver; for no person dealing with another, and knowing him to have in his hands or under his control money belonging to a third person, can deal with the individual holding that money for his own private benefit, when the effect of the transaction is that a fraud is necessarily committed upon such third party. (*h*)

Loss of Trust-Money in the Hands of Bankers.— If an agent or trustee who has received a sum of money for the use of his principal or beneficiary pays the money into a bank in the name of the principal or beneficiary, and places it to the account of the latter, the amount then remains in the bank at the risk of the principal, and if the banker fails, the principal must bear the loss. But if the agent or trustee pays in the money to his own account and his own credit, this is a user of the money for which he will be responsible. If he had an implied authority to use the money, and has so exercised it, then he stands, as before mentioned, in the position of a borrower for use and consumption. In either case he is bound to make good the loss. (*i*)

Payment of Forged Cheques, Drafts, and Orders on Bankers — Forgery facilitated by the Negligence of the Customer.¹ (See

¹ For a summary of law applicable to the various ways in which cheques may be forged or altered, see Morse, Banks (2d ed.) 327–367, and U. S. Dig. tit. *Banking*, sect. 194.

When a debtor pays his debt by a cheque to the order of his creditor, or of one nominated by the latter, and the cheque is lost by, or fraudulently obtained from,

(*h*) *Bodenham v. Hoskins*, 21 L. J. Ch. 83; *Ex parte Morier*, 12 Ch. D. 491, C. 864; 16 Jur. 721; *Bridgman v. Gill*, 24 A.

Beav. 302; *Kingston, ex parte*, L. R. 6 Ch. 632; *per Blackburn, J.*, *Bailey v. Wren v. Kirton*, 11 Ves. 377; *Rocke v. Hart*, ib. 61; *Massey v. Banner*, 4 Mad. 418, 419; 1 Jac. & Walk. 241.

Bills of Exchange Act in Appendix.)—If money is drawn out of the bank by means of a forged order purporting to have been made by the customer, the banker must sustain the loss. Where a cheque drawn by a customer on his banker for a sum of money described in the body of the cheque in words and figures was afterward altered by the holder, who substituted in a different handwriting a larger sum than that mentioned in the cheque, in such a manner that no one in the ordinary course of business would have observed it, and the banker paid the larger sum to the holder, it was held that he could not *lawfully debit the customer with the over-pay- [*372]

the creditor, and is paid to the finder or fraudulent holder on a forged indorsement of the payee's name, the debtor is not discharged, and may again be called upon to pay his debt, at least unless the cheque was taken in absolute payment and extinguishment thereof. *Thomson v. Bank of British North America*, 82 N. Y. 1.

A bank paid a cheque upon a forged indorsement, charged the amount to the drawer, and settled with him accordingly. Upon suit brought by the payee against the bank, — *Held*, that there was sufficient privity to maintain the action. *Millard v. National Bank of the Republic*, 3 MacArthur, 54. A raised cheque, payable to A or bearer, was presented by B, whom A had requested to cash the same, after banking hours, to the cashier, who pronounced it good. B took an assignment of the cheque from A and paid the amount thereof. The bank subsequently cashed the cheque in ignorance of the alteration, of which B also was ignorant. *Held*, that the bank could recover from B the amount paid. *Parke v. Roser*, 67 Ind. 500.

The duty of the drawee, upon acceptance of a cheque, to pay the same only upon the genuine indorsement of the payee named therein is not affected by a custom among bankers as to the mode of ascertaining the identity of the person indorsing the payee's name and receiving payment. *Dodge v. National Exchange Bank*, 30 Ohio St. 1; s. c. 20 ib. 234.

A bank is not estopped from alleging the forgery of a cheque by the fact that the teller when the cheque was presented for certification, upon doubts being expressed regarding it by the person who presented it, stated that it was right in every particular. It is no part of the teller's duty to give an assurance as to the genuineness of a cheque, except regarding the drawer's signature, and beyond that the bank is not bound by his representations.

Security Bank v. National Bank of the Republic, 67 N. Y. 458. As to how far the drawer's cheque-book, containing the stubs of cheques alleged to have been forged, is evidence, see *Hardy v. Chesapeake Bank*, 51 Md. 562.

See, further, *Schroeder v. Harvey*, 75 Ill. 638; *First Nat. Bank v. Ricker*, 71 Ill. 439; *De Feriet v. Bank of America*, 23 La. Ann. 310; *Commercial Bank v. First Nat. Bank*, 30 Md. 11; *National Bank of North America v. Bangs*, 106 Mass. 441; following *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 441; *Belknap v. National Bank*, 100 Mass. 376; *Charles River Nat. Bank v. Davis*, ib. 413; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *Seventh Nat. Bank v. Cook*, 73 Pa. St. 483; *City Bank v. National Bank*, 45 Tex. 203; *Rowe v. Putnam*, 131 Mass. 281; *Laborde v. Assoc.*, 39 Am. Dec. 517, and n.

ment. (*k*) But if the banker has been defrauded through the carelessness or negligence of the customer in drawing the cheque, the loss must be borne by the customer. Where the customer signed several blank cheques and left them in the hands of his wife to be filled up, and she handed a cheque to a clerk to be filled up for £50 2s. 3d., and the clerk filled up the cheque for the specified amount, and showed it to the wife, but the "fifty" was commenced in the middle of the line, so that the words "three hundred and" could easily be written before it, and space was left at the bottom of the cheque for the insertion of the figure 3 between the £ and the figures 50, and the clerk on his way to the bank altered the cheque to £350, and got that amount from the bankers and absconded, it was held that the customer must bear the loss, as it had been occasioned by his own negligence and the negligence of his agent in dealing with the blank cheque. (*l*) Negligence in dealing with a cheque or draft must, in order to amount to an estoppel, be negligence in the transaction itself, and the proximate cause of leading the third party into mistake, and must be a breach of some duty owing to such third party or to the public at large. (*m*) .

Forged Indorsements. — We have seen that, if a bill of exchange has been accepted by a customer, payable to order at his bankers, the acceptance of the bill is an authority to the bankers to pay the bill only to a person who becomes the holder by a genuine indorsement from such customer. If bankers wish to avoid the responsibility of deciding on the genuineness of the indorsement, they must require their customer to make his bills payable at his own offices, and to honor the bills by giving a cheque on them; for they cannot debit a customer with a payment made to a party who claims through a forged indorsement, and so cannot give a valid discharge for the bill, unless there are circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of

(*k*) *Hall v. Fuller*, 5 B. & C. 750; 8 D. & R. 464. As to advances by bankers, at the request of their customers, on forged securities, see *Woods v. Thiedemann*, 1 H. & C. 478; or on securities fraudulently obtained, *Re Carew's Estate*, 31 Beav. 39; 31 L. J. Ch. 214.

(*l*) *Young v. Grote*, 12 Moore, 489; 4 Bing. 257.

(*m*) *Arnold v. The Cheque Bank*, 1 C. P. D. 578; *Patent Safety Gun Cotton Co. v. Wilson*, 49 L. J. 713 C. A.

the indorsement, or a subsequent admission on the part of the customer of the genuineness of the indorsement inducing the bankers to alter their position, so as to preclude the customer from showing it to be forged. (*n*) But by the 16 & 17 Vict. c. 59, sect. 19, any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall when presented for payment purport to be indorsed by the *person [* 373] to whom the same shall be drawn payable, shall be sufficient authority to the banker to pay the amount of such draft or order to the bearer thereof, and it shall not be incumbent on the banker to prove that such indorsement or any subsequent indorsement was made by and under the direction or authority of the person to whom the draft or order was or is made payable, either by the drawer or any indorser thereof. And see also sect. 60 of Bills of Exchange Act in Appendix. But this enactment does not extend to protect any other person who takes the cheque upon the faith of such forged indorsement. (*o*) An indorsement of a cheque "per proc." or "as agent" is an indorsement by the payee within the statute, although the indorser has no authority to indorse. (*p*)

Cheques paid by Mistake. — If a banker pays the cheque of a customer, supposing that he has funds, and afterward finds that the customer has overdrawn his account, and that he has no funds, the banker cannot recover the money from the party who presented the cheque; (*q*) but if the cheque was not drawn on the banker, and the latter does not pay the cheque as a banker honoring the draft of his customer, but in the same way as if he were giving change for a bank-note, all parties believing the cheque to be genuine, he can recover back the money he has paid, if it turns out to be forged and worthless. (*r*)

Payment of Cheques at Branch Banks. — The different branch banks of a banking company are, as regards their separate customers, separate companies, so that a customer who keeps an account with one branch has no right to draw cheques upon, and

(*n*) *Roberts v. Tucker*, 16 Q. B. 578; (*p*) *Charles v. Blackwell*, 1 C. P. D. sect. 24 of the Bills of Exch. Act in 548; 2 C. P. D. 151, C. A. App.

(*o*) *Ogden v. Benas*, L. R. 9 C. P. 125; 32 L. J. C. P. 30. (*q*) *Chambers v. Miller*, 13 C. B. N. S. 513; *Bobbett v. Pinkett*, *post*, p. * 375.

(*r*) *Woodland v. Fear*, 7 Ell. & Bl. 522.

have them cashed by, another branch. They are also separate and distinct for many other purposes. (s) But in principle they are agencies of one principal banking firm, although regarded as distinct for special purposes. (t) Where a customer had an account with two branches of a bank, it was held that, in the absence of any special agreement with their customer, the bank had a right to consider the two accounts as one, and to refuse the customer's cheque when, on adding the two accounts together, the balance was against him. (u)

Crossed Cheques.¹—By the 39 & 40 Vict. c. 81, called "The Crossed Cheques Act, 1876,"—the provisions of which are re-

¹ On "certified" cheques, as they are termed in the United States, consult Ball, Nat. Bank, 72-76 and 207; Morse, Banks (2d ed.), 199, 321, 358, 364, also 94 and 103; U. S. Dig. tit. *Banking*, sect. 187.

By certifying a cheque, the bank becomes the primary debtor, and continues liable indefinitely, like an acceptor of a bill, until payment. *Nolan v. Bank of New York*, 67 Barb. 24.

After the certification of a cheque by the drawee, the drawer is discharged only in the event of a loss or injury accruing from a neglect to present for payment within a reasonable time after the date of the cheque, or in the event of a neglect to present for payment within six years from the date. *Thomson v. Bank of British North America*, 45 N. Y. Superior Ct. 1.

Where a bank certifies a cheque, which is afterward transferred to an innocent holder for value, it cannot set up in defence to an action thereon that the cheque was obtained from the maker fraudulently and without value, or that the name of the payee is fictitious, where the person obtaining the cheque and the certification was intended to be the payee by the maker. *Merchants' Loan, &c. Co. v. Bank of the Metropolis*, 7 Daly, 137.

If a cheque is raised and subsequently certified, the bank is liable to a holder in good faith (*Louisiana Nat. Bank v. Citizens' Bank*, 28 La. Ann. 189), and so it is when chargeable with negligence in certifying a cheque that was drafted in such a way as to admit of a fraudulent alteration of the amount being easily made and the cheque was raised (*Helwege v. Hibernia Nat. Bank*, ib. 520).

After a cheque drawn for the payee's accommodation, but with no restriction as to its use, has passed to a holder in good faith and been certified, the drawer cannot escape liability by notifying the bank not to pay it. *Freund v. Importers', &c. Bank*, 76 N. Y. 352.

To render liable the drawer of a cheque certified by the bank as "good," the holder must present it for payment within the business hours of the next day after it is received. *Andrews v. German Nat. Bank*, 9 Heisk. 211; compare *Schoolfield v. Moon*, ib. 171.

A cheque containing the recital: "To hold as collateral for 1000 P. T. oil, pipage paid," &c., and certified as "Good when properly indorsed," is not drawn

(s) *Woodland v. Fear*, 7 Ell. & Bl. 521; 26 L. J. Q. B. 202; *Clode v. Bayley*, 12 M. & W. 51.

(t) *Prince v. Oriental Bank Corporation*, 3 Ap. Cas. 325.

(u) *Garnett v. McKewan*, L. R. 8 Ex. 10; 42 L. J. Ex. 1.

produced, with two slight additions, sect. 77 (1) (6), in the Bills of Exchange Act, 1882, sects. 76-82, in Appendix, — it is enacted by * sect. 3, that, in this act, "cheque" means [*374] a draft or order on a banker payable to bearer, or to order on demand, and includes a warrant for payment of dividend on stock sent by post by the Governor and Company of the Bank of England or of Ireland, under the authority of any act of parliament for the time being in force.

"Banker" includes persons or a corporation or company acting as bankers.

By sect. 4, where a cheque bears across its face an addition of the words "and company," or an abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, and either with or without the words "not negotiable," that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally.

Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition shall be deemed a crossing, and a cheque shall be deemed to be crossed specially, and to be crossed to that banker.

By sect. 5, where a cheque is uncrossed, a lawful holder may cross it generally or specially.

Where a cheque is crossed generally, a lawful holder may cross it specially.

Where a cheque is crossed generally or specially, a lawful holder may add the words "not negotiable."

Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent, for collection.

By sect. 6, a crossing authorized by this act shall be deemed a material part of the cheque, and it shall not be lawful for any

in the usual course of banking business, and such certification does not bind the bank. *Dorsey v. Abrams*, 85 Pa. St. 299.

See, further, *Brown v. Leckie*, 43 Ill. 497; *Casco Bank v. Keene*, 53 Me. 103; *Continental Bank v. Bank of the Commonwealth*, 50 N. Y. 575; *National Bank of Commerce v. National Mechanics' Banking Assoc.*, 55 N. Y. 211; *Marine National Bank v. National City Bank*, 59 N. Y. 67; *Security Bank v. National Bank of the Republic*, 67 N. Y. 458; *Seventh National Bank v. Cook*, 73 Pa. St. 483; *Girard Bank v. Bank of Pennsylvania Township*, 39 Pa. St. 92; *First National Bank v. Merchants' National Bank*, 7 W. Va. 544.

person to obliterate or, except as authorized by this act, to add to or alter the crossing.

By sect. 7, where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker.

Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or to his agent for collection.

By sect. 8, where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof.

By sect. 9, when the banker on whom a crossed cheque is drawn has in good faith, and without negligence, paid such cheque, if crossed generally to a banker, and if crossed specially to the banker to whom it is crossed, or his agent for collection, being a banker, the banker paying the cheque and (in case such cheque has come to the hands of the payee) the drawer thereof shall respectively be entitled to the same rights, and [* 375] be placed in the same position in *all respects, as they would respectively have been entitled to and have been placed in if the amount of the cheque had been paid to and received by the true owner thereof.

By sect. 10, any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same shall be crossed, or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

By sect. 11, where a cheque is presented for payment which does not at the time of presentation appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this act, a banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated, or having been added to or altered otherwise than as authorized by this act, and of payment being made otherwise than to a banker, or

the banker to whom the cheque is or was crossed, or to his agent for collection, being a banker (as the case may be).

By sect. 12, a person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable," shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had.

But a banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself, shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment. (*ww*)

The above act was passed in consequence of the decision in *Smith v. Union Bank of London*. (*x*)

The plaintiff drew a cheque on M. & Co., crossed L. & C. Bank. It was drawn to order, and the indorsement forged. The defendant became an innocent holder, and sent it to his bankers, who sent it to M. & Co., who cashed it, not noticing it was crossed L. & C. Bank. The jury found the plaintiff, the payee, and M. & Co. guilty of negligence. It was held that the defendant had acquired no title, that M. & Co. had paid the money to the wrong bankers, and that the plaintiff might recover. (*y*)

Lien of Bankers.—Bankers have a lien upon all the securities of their customers in their hands for advances in the ordinary * course of business, unless such securities [* 376] have been received under special arrangement inconsistent with the exercise of the right, (*z*) or for some special purpose. (*a*) But they have no lien on boxes and their contents deposited with them for convenience and safe custody merely. (*b*)

Damages for Non-payment of Cheques by Bankers.—If a banker refuses to pay a cheque drawn upon him by a trader who keeps an account with him, and who has sufficient assets in the

(*ww*) See *Matthiessen v. London & County Bank*, 5 C. P. D. 7, and sects. 81 & 82 in Bills of Exch. Act in App.

(*x*) *Smith v. Union Bank of London*, L. R. 1 Q. B. D. 31.

(*y*) *Bobbett v. Pinkett*, 1 Ex. D. 368.

(*z*) *Jones v. Peppercorn*, 28 L. J. Ch. 158; *Meadows, in re*, 28 L. J. Ch. 891;

City Bank, ex parte, 3 Law T. R. N. S. 792; *In re European Bank*, L. R. 8 Ch. 41.

(*a*) *Brandao v. Barnett*, 12 Cl. & Fin. 787; *Wylde v. Radford*, 33 L. J. Ch. 51; *London Chartered Bank of Australia v. White*, 4 Ap. Cas. 413.

(*b*) *Leese v. Martin*, L. R. 17 Eq. 224.

hands of the banker to meet the cheque at the time it is presented for payment, such trader is entitled, as we have seen, to recover substantial damages without proof of any actual damage, since the dishonoring of cheques is likely to be very injurious to the credit of persons in trade. (c)

Of a Mandate or Gratuitous Commission.¹ — If the bailee or depositary expressly or impliedly undertakes for something more than the mere passive custody of the thing bailed, the bailment advances from a mere naked deposit or simple bailment to a mandate, and the bailee becomes clothed with the duties and implied engagements of a mandatary, in addition

¹ See Edwards, Bailments, sects. 74-119; Schouler, Bailments, Part II. p. 28, &c.; Story, Bailments, sects. 137-218; U. S. Dig. tit. *Bailment*, sects. 114-164. Some county record-books and papers having been stolen, the county officers deposited with A a sum of money as a reward to be paid on the return of the property. Subsequently A received a paper, signed by the deputy sheriff of the county, acknowledging the receipt of the record-books, "also papers and small index-books," and thereupon A paid the reward. *Held*, that A, being a bailee without compensation, was not responsible, in the absence of bad faith, for the condition of the property at the time of its return. *Eldridge v. Hill*, 97 U. S. 92.

A gratuitous bailee who was to take bonds abroad, deposit them for sale, and inform the owner of such deposit, is liable only for gross negligence, which is for the jury to determine, and their verdict will not be disturbed where there are two inferences equally reasonable that may be drawn from the evidence. *Carrington v. Ficklin*, 32 Gratt. 670.

Joint mandataries must act jointly, and the death or withdrawal of one of them terminates their power. *Hawley v. Keeler*, 53 N. Y. 114, 121; see *Hamilton v. Mutual Life Ins. Co.*, 9 Blatchf. 235; *Sinclair v. Jackson*, 8 Cow. 543.

Like other bailees, a mandatary can maintain an action against any third person for the loss, injury, or conversion of the property. *Little v. Fossett*, 34 Me. 545; *Bowen v. Fenner*, 40 Barb. 383; *Bass v. Pierce*, 16 Barb. 595; *Paddock v. Wing*, 16 How. Pr. 517; *Green v. Clarke*, 12 N. Y. 343; *White v. Bascom*, 28 Vt. 268.

The rule that a mandatary, like a depositary, is liable only for gross negligence or bad faith, must be understood with reference to the subject and nature of the bailment and the circumstances attending its execution. *Tracy v. Wood*, 3 Mas. 132; see *McNabb v. Lockhart*, 18 Ga. 495; *Dunn v. Branner*, 13 La. Ann. 452; *Conway Bank v. American Exp. Co.*, 8 Allen, 512; *Eddy v. Livingston*, 35 Mo. 487; *Tompkins v. Saltmarsh*, 14 Serg. & R. 275; *Jenkins v. Motlow*, 1 Sneed, 248.

The delivery to another person of a package containing money in order to complete the execution of the trust, has been held to be gross negligence. *Skelley v. Kahn*, 17 Ill. 170; *Colyar v. Taylor*, 1 Coldw. 372.

As the mandatary acts gratuitously, the mandator may at any time revoke the mandate, as by transferring the property to another (*Hodges v. Hurd*, 47 Ill. 363), and sufficient notice is given to the mandatary by the appointment of another to relieve him of the trust (*Copeland v. Mercantile Ins. Co.*, 6 Pick. 198).

(c) *Rolin v. Steward*, 14 C. B. 595; 23 L. J. C. P. 148.

to those of a mere depositary for keeping. If money is bailed to a man upon the faith of a promise made by him to take and deliver it to a banker, or to invest it in the public funds, or lay it out in the purchase of lands, this is an express mandate. An implied mandate arises when the bailee takes charge of living animals or perishable chattels, for whose preservation and safe-keeping a certain amount of work and labor, attention and skill, is necessarily requisite, and which the bailee, by accepting the trust and duty, impliedly undertakes to furnish. It is essential to the existence of a mandate that it be gratuitous; for if anything is to be paid for what is expressly or impliedly agreed to be done, the contract immediately becomes a contract of letting and hiring of labor and skill to be performed and exercised upon the thing bailed. (*d*)

The term *mandatum* or mandate was applied in the Roman law to all gratuitous agencies and procurations, whether made concerning land or realty or chattels, and whether accompanied or unaccompanied by any transfer or delivery of property. (*e*) In the common law, the term is generally restricted to express or implied promises made on bailments of chattels that something shall be *done with them gratuitously for [*377] the benefit of the bailor. The bailor who makes the request and gives the directions as to the disposal of the chattel is called the mandator; and the bailee who receives the chattel upon the terms expressed or implied, and assents to the directions, and undertakes the trust to be performed, is called the mandatary. So long as there has been no actual bailment by the delivery and acceptance of the chattel, there is no binding contract of mandate. A promise to do something with a thing that has never been put into the actual or constructive possession of the promisor is a mere *nudum pactum* which may be revoked; but when the bailment has been made upon the faith of the promise, and the promisor has obtained possession of the chattel in execution of the mandate, the contract is complete, and he is bound faithfully to discharge the trust he has undertaken.

(*d*) "In summa sciendum est, mandatum nisi gratuitum sit in aliam formam negotii cadere; nam, mercede constituta, incipit locatio et conductio esse." — *Inst.* lib. 3, tit. 27, sect. 13.
 (*e*) *Inst.* lib. 3, tit. 27.

Nonfeasance and Misfeasance.¹ — It has been said, in reference to gratuitous undertakings to perform work, that if the promisor does not proceed on the work, no action will lie against him for the nonfeasance; but “if he proceeds on the employment, he makes himself liable for any misfeasance in the course of that work.” But when a man promises to perform work upon, or to do something with, the chattel of another, and the chattel is bailed to him for the purpose expressed, his acceptance of the possession of the chattel in execution of his engagement is an “entering on the work and employment;” and if, after having accepted such possession and taken the chattel away with him, he neglects to do that which he promised to perform, this neglect is a misfeasance, for which he shall be responsible. (*f*) “A bare being trusted,” observes Holt, C. J., “with another man’s goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust and take the goods into his possession.” (*g*) Where a sum of money was bailed to a party upon the faith of an undertaking made by him to cause the sum to be paid to the bailor or his order at a distant place, it was held that the bailment of the money was a sufficient consideration for the undertaking, and that the mandatary was responsible for the non-fulfilment of his engagement. (*h*) So where certain boilers were delivered to a man upon the faith of an undertaking made by him to weigh them gratuitously and return them to the bailor in as perfect and complete condition as they were in at the time of the making of the bailment, and the mandatary took the boilers to pieces

in order to weigh them, but refused to put them together [*378] again, it was held that he was responsible for * his breach of contract, and must make good the damage that had been sustained by the mandator. The mandatary may, indeed, revoke his promise and return the chattel, if he does it without delay, and before his acceptance of the trust and omission to fulfil it have occasioned loss or damage to the man-

¹ See *Morrison v. Orr*, 3 Stew. & P. 49, 23 Am. Dec. 319, and note by A. C. Freeman, ib. 322.

(*f*) Holt, C. J., *Coggs v. Bernard*, 2 Raym. 919, 920; *Elsee v. Gatward*, 5 T. R. 149; *Balfie v. West*, 22 L. J. C. P. 143.

175; 13 C. B. 466.

(*g*) *Coggs v. Bernard*, 2 Raym. 912.

(*h*) *Shillibeer v. Glynn*, 2 M. & W.

dator ; but he cannot, if the revocation will place the latter in a worse position than he was in at the time the mandate was accepted and the promise made, lawfully withdraw such promise, and refuse to execute the trust. "Every man is at liberty," it is observed in the Institutes, "to refuse a mandate ; but when once accepted and undertaken, it must be performed or renounced as soon as possible, that the mandator may transact the business himself or through another." (i) If, therefore, a party undertakes to procure an insurance for another, and proceeds to carry his undertaking into effect by getting a policy underwritten, but deals so negligently with the policy that the benefit of the insurance is totally lost to the party for whom he promised to effect it, he is liable to an action (k) ; but if, after having made the promise, he simply neglects to get the insurance effected, it is said he is not liable for the default. (l)

Bailment of Money and Chattels to be carried gratuitously — Loss or Damage from Negligence. — A bailee who has undertaken gratuitously to convey money or goods from one place to another, and has entered upon the trust by accepting possession of the money or the goods, is bound to exercise the same care and diligence in the execution of the task as a person of ordinary care and prudence might be expected to exercise in the conveyance of his own property. If by negligence and mismanagement in the accomplishment of his undertaking, the money or the goods are lost or stolen, injured or spoiled, he will be responsible for the loss. But he is not responsible for the loss of the money if he is forcibly robbed without any default on his part.

Bailments of Chattels to be mended or repaired gratuitously — Employment of Unskilful Persons. — If a chattel is bailed to a workman or artificer in some particular art, craft, or profession, upon the faith of an undertaking made by the bailee to mend, repair, or improve it gratuitously for the benefit of the mandator, the mandatory must complete the work within a reasonable period, and must be especially mindful that the article is not injured in his hands during the performance of the work through a want of that knowledge and skill which every workman and

(i) Inst. lib. 3, tit. 27, sect. 11.

(l) *Thorne v. Deas*, 4 Johns. U.S. 84.(k) *Wallace v. Tellfair*, cited *Wilkinson v. Coverdale*, 1 Esp. 76.

artificer in his particular art or craft is bound to possess (*post*, pp. *404, *407). But if a person known to be unskilled [*379] in the particular work or *employment he gratuitously undertakes, does the work at the solicitation of a friend with such ability as he possesses, he stands excused, although it is unskilfully done; for it is the mandator's own folly to trust him, and the party engages for no more than a reasonable exertion of his capacity. Thus where a mandatary undertook to get some articles that had been bailed to him entered at the Custom House, and gave by mistake a wrong description, but appeared to have acted *bona fide* and to the best of his ability, it was held that he was not responsible for a seizure of the goods by the Custom House officers. "Had the situation or profession of the bailee," observes Lord Loughborough, "been such as to imply skill, an omission of that skill would have been imputable to him as gross negligence. If in this case a shipbroker or a clerk in the Custom House had undertaken to enter the goods, a wrong entry would in him be gross negligence, because the situation and employment necessarily imply a competent degree of knowledge in making such entries." (*m*)

In Respect of the Custody and Safe-keeping of the Chattel, the mandatary is clothed with the ordinary liabilities and responsibilities of a depositary.

Bailment of Money for Investment. — If money is bailed to a man upon the faith of a promise or assurance made by him to place it out at interest, or to purchase an annuity with it for the benefit of the bailor, the mandatary who accepts the money and enters upon the execution of the trust impliedly promises to be diligent and careful in the fulfilment of his undertaking, and to exercise common and ordinary care in the selection of a safe investment; and if the money is lost by his miscarriage and neglect, an action will lie against him for the loss. (*n*) But the mandatary is not responsible (if he does not exercise any trade or profession denoting that he has peculiar skill in money matters) for the exercise of more than ordinary care and caution; and he is not liable for the failure of the investment, if he has used

(*m*) *Shiells v. Blackburne*, 1 H. Bl. 159; *Moore v. Morgue*, 2 Cowp. 479. *Whitehead v. Greetham*, 10 Moore, 194; 2 Bing. 464.

(*n*) *Coggs v. Bernard*, 2 Rayn. 910;

such skill and knowledge as he possessed, and has acted with uprightness and honesty of purpose in the transaction of the business confided to him. "The only duty that is imposed upon him under such a retainer and employment is a duty to act faithfully and honestly, and not to be guilty of any gross or corrupt neglect in the discharge of that which he undertakes to do." (o) But an attorney, whose profession and employment naturally lead him to have some knowledge of securities for money and pecuniary * investments, is responsible [*380] for the exercise of a reasonable amount of professional knowledge and skill in the selection of a safe investment, although he acts gratuitously. (p) His office, profession, and employment imply skill and invite confidence; and an omission of that skill is imputable to him as gross negligence. (q) If a sum of money is intrusted to a man to be transmitted to some distant part, or to be laid out by him in some purchase or investment for the benefit of the mandator, and with an express or implied authority or permission to use the money himself until the purpose for which it was bailed can be accomplished, and the mandatary accordingly spends the money with the intention of replacing it when necessary with other money, or pays it into his bankers to his own account, and not to the separate account of the mandator, the bailment of the money becomes a loan for use and consumption, and the bailee is clothed with the duties and liabilities and implied engagements of a borrower by way of *mutuum*, in addition to those of a mandatary (*ante*, p. * 347). In these cases the money is payable, as we have seen, absolutely and at all events; and the bailee cannot excuse himself from the obligation to repay the amount by showing a loss by robbery or from inevitable accident.

Bailments of Living Animals—Negligent Management.—If the subject-matter of the bailment consists of living animals, such as horses, oxen, cattle, or sheep, the mandatary is bound to furnish them with suitable food and nourishment, and to give them a proper and reasonable amount of exercise and fresh air. If a

(o) *Dartnall v. Howard*, 4 B. & C. 311; *Craig v. Watson*, 8 Beav. 427; *Smith v. Pockocke*, 23 L. J. Ch. 545; 18 Jur. 478.

(p) *Donaldson v. Haldane*, 7 Cl. & F. 762; *Bourne v. Diggles*, 2 Chitt. * 379.

(q) *Shiells v. Blackburne*, *ante*, p.

man takes charge of cattle or sheep, and afterward takes no heed of them, but lets them stray away on a common, and get drowned or lost, this is a breach of trust, and he is responsible for the loss. (*r*) If he turns a horse, of which he has consented gratuitously to take charge, into a dangerous pasture after dark, and the horse falls into a pit or well, or into the shaft of a mine, this is a gross neglect and breach of trust, and he shall be responsible for the loss. (*s*) If he places a horse in a pasture surrounded by rotten and very defective fences, and the horse, by reason thereof, strays away and is lost, this is also a breach of trust, for which he shall be answerable; but if the horse was a wild, ungovernable animal, and got away through its own impatience of restraint as much as by reason of the defective fences, then the bailee will not be responsible for the loss. (*t*)

[*381] * Where an agister (not a gratuitous bailee) placed the plaintiff's horse in a field where there were heifers, knowing that a bull was in the habit of getting into the field, though he did not know it was vicious, and the bull gored the horse, it was held that the *scienter* was immaterial, as he had contracted to take reasonable care, and had not done so. (*u*) What is, and what is not, gross negligence amounting to a breach of trust is often a mixed question of law and fact, but more generally a pure question of fact. It must be judged of by the actual state of society, the general usages of life, and the dangers peculiar to the times, as well as by the apparent nature and value of the subject-matter of the bailment, and the degree of care it seems to require. (*v*) Where a man proved to be conversant with, and skilled in, horses was commissioned to ride a horse to a neighboring village, for the purpose of showing it for sale, and on his arrival he rode the horse into the race-ground, which was wet and slippery, and the horse slipped and fell several times, and at last in falling broke one of its knees, it was held that the bailee had been guilty of a culpable neglect and breach of trust, and was answerable for the damage. (*y*) If a

(*r*) Hil. Term. 2 Hen. VII., 9 b;
Coggs v. Bernard, 2 Raym. 913.

(*s*) Rooth v. Wilson, 1 B. & Ald. 61, 62.

(*t*) Domat (*Depot*), sects. 3, 6.

(*u*) Smith v. Cook, L. R. 1 Q. B. D.
79; see *post*, p. * 417.

(*v*) Story on Bailments, 9, 10.

(*y*) Wilson v. Brett, 11 M. & W. 113.

farrier undertakes to treat a living animal for some disorder gratuitously, he is nevertheless bound to exercise the ordinary knowledge and skill of his art or profession in the course of his treatment, and will be responsible for injuries resulting from his neglect to do so. (z)

Bailments of Perishable Commodities. — If the subject-matter of the bailment is a perishable commodity, the bailee is bound to bestow such an amount of labor and vigilance for its preservation as would ordinarily be bestowed by a prudent owner. If the mandatary of a valuable painting lets it lie on the damp ground, or places it in a kitchen, or against a damp wall in a room where there is no fire, when he might have placed it in a dry situation and in perfect security, this is an act of gross negligence. (a)

Of the Use of the Subject-Matter of the Mandate. — A mandatary has no right to make use of the subject-matter of the bailment for his own gain and advantage; if he does so, and it is lost, or in any way injured or deteriorated in value by reason of the user, he must, in common with a depositary, make good the loss. The moderate exercise of a horse, or a hound, or a living animal, is necessary for its health and safe preservation, and is, consequently, a user for the benefit of the owner.

A mandatary who has charge * of a milch-cow or of [* 382] sheep is bound to milk the cow and shear the sheep, and must account for the produce to the mandator; if he sells the milk or the wool, and refuses to pay over the money, this is a conversion of it to his own use, and a breach of trust, for which he shall be held responsible. If the bailment is made under circumstances leading to the conclusion that the bailee was to have the use of the thing in return for his labor and pains in the keeping of it, as if he were to have the milk of the cow, the wool of the sheep, or the young of animals bearing increase, for his own benefit and advantage, then the bailment would amount to a contract of borrowing and lending, and not to a mandate.

Theft and Negligence by Servants of the Mandatary. — If the mandatary has given express directions to his servant to take

(z) *Shiells v. Blackburne*, 1 H. Bl. 162. (a) *Mytton v. Cock*, 2 Str. 1099.

into his custody money, or chattels, or securities, and do with them that which he himself has undertaken to perform, the negligence of the servant in carrying into execution the orders of the master is the negligence of the master, and the latter will be responsible accordingly; but if the servant deals with the property of his own will, and without the warrant or authority of the master, the latter is not responsible, unless there be a default in him in knowingly employing a drunken, negligent, or dishonest servant.

Payment of Expenses.—By the Roman law the mandator was bound to reimburse the mandatary all expenses that he had necessarily and unavoidably incurred in the safe-keeping and preservation of a chattel intrusted to his care and management; for it was considered that a gratuitous commission executed for the behoof of the mandator ought not to be made a subject of expense and charge to the mandatary. (*b*) In the common law, if the mandatary must necessarily incur expense in the execution of the commission intrusted to him, he is clothed with an implied authority from the mandator to defray such expenses. (*c*) The French law accords to the mandatary a right to detain the chattel until he has received payment of the expenses he has incurred in the execution of the trust concerning it. In our own law no such right exists; and no lien is permitted to be claimed by one man upon the property of another for the expenses attendant upon the execution of a gratuitous commission.

Taskwork.—A contract for the letting out and hiring of “work by the great,” or, as it is more commonly called, job or taskwork, is a contract for the doing of work in the lump or the job, for a stipulated or implied remuneration, such as a contract to build a house, or dig a well, or make a canal, [* 383] * or to construct a ship or carriage out of materials furnished by the employer, or to sell goods for a commission on the sale. A contract of this description was styled by the civilians *LOCATIO OPERIS FACIENDI*, or the letting out of work to be done. The employer was called *LOCATOR OPERIS*, or

(*b*) Dig. lib. 16, tit. 3, l. 12, sect. 23; (*c*) Story's Bailments, sect. 197.
Domat, lib. 1, tit. 15, sect. 2, sect. 6.

the letter-out of the work; and the workman who undertook the task, and bestowed his labor and skill in its completion, for a reward to be paid to him, was called *CONDUCTOR OPERIS*, or the hirer of the work. The terms letter and hirer, however, are applicable, in different senses, to each of the contracting parties. Thus the *locator operis*, or letter-out of the work, is also *conductor operarum*, or hirer of the labor and services; and the *conductor operis*, or hirer of the work, is also *locator operarum*, or the letter-out of the labor and services. (*d*) When chattels are delivered to a warehouseman or storekeeper to be taken care of or kept for hire, the contract is a contract for the letting and hiring of care and custody, termed *LOCATIO OPERIS ET CUSTODIÆ*.

Of the Distinction between Contracts for Work and Services and Contracts of Sale.—There is a great analogy between contracts for working up materials and the contract of sale; for if the materials for the work, as well as the work itself, have been furnished by the workman, then the contract is in general a contract of sale; while, on the other hand, if the employer has furnished the materials, and the undertaker of the work contributes his labor merely, the contract is a contract of letting and hiring of labor (*post*, Contracts for Sale). If the groundwork of the labor or the principal material entering into its composition has been provided by the employer, the contract is a contract for the letting and hiring of work, although the undertaker of the work may have furnished the accessorial materials necessary for its completion. If a man, for instance, sends his own cloth to a tailor to be made into a coat, and the tailor furnishes the buttons, the thread, and the trimmings, the contract is nevertheless a letting and hiring of work, and not a contract of buying and selling. (*c*) In the case of works of art, the work and skill of the workman constitute, in general, the essence of the contract, the materials being merely accessorial; and whenever the skill and labor are of the highest description,

(*d*) "Sed dicendum est in hac specie locationis diverso respectu eundem et locatorem et conductorem videri. Nam qui operam locare dicitur, ille idem dicitur conducere opus faciendum; et ex contrario qui operam dicitur conducere, idem dicitur locare aliquid faciendum; ut con-

ductor operis idem sit operæ locator, et locator operis idem operæ conductor." —*Vin. Com.* lib. 3, tit. 25, p. 758; Poth. Louage, No. 392.

(*e*) Pothier, Louage d'ouvrage, No. 394.

and the materials of small comparative value, the contract is a contract for work, labor, and * materials, and not a contract of sale. (*f*) A contract, for example, for the printing of a book is a contract for the letting and hiring of work and services, although the printer supplies both the paper and the ink, and not a contract of sale. (*g*) But a contract by a dentist to make a set of artificial teeth, to fit the mouth of the employer, is a contract for the sale of a chattel and not a contract for work and labor. (*h*) When a contract has been entered into for the building of a house on the land of the employer, and the builder furnishes the timber, stone, and materials for the construction of the building, the contract is not a contract of sale, although it appears as if the builder sold the materials, but a contract of letting and hiring, because the land which is the principal material for the labor, and to which the building is merely an accessory, has been provided by the employer. (*i*) If, indeed, the builder is, by the contract, to provide the ground as well as the accessorial materials for the house, then the contract is a contract of purchase and sale.

Executory and Executed Contracts for Work. — Contracts for work and services, like all other contracts of letting and hiring, are perfected by the bare consent of the parties, so that as soon as the mutual promises are exchanged the right to the benefit of the work passes to the workman or hirer of the job, and the right to the labor to the employer or letter of the work. (*k*) If a mutual misunderstanding has arisen without any fault or want of good faith on either side, as if the workman has mistaken the meaning of the employer, and made one thing when another was ordered, the contract is void, as no valid and effectual consent to bind the parties has ever been given. If there is no mutual engagement between the parties for the one to do the work and the other to provide it and pay for its execution, there is, as we have before seen, no binding contract at all, unless the engagement is under seal (*ante*, pp. * 12, 13). The workman in such a

(*f*) See, however, the remarks of Crompton, J., and Blackburn, J., in *Lee v. Griffin*, 1 B. & S. 278.

(*h*) *Lee v. Griffin*, *supra*.

(*i*) Dig. lib. 19, tit. 2, lex 22, sect. 2.

(*g*) *Clay v. Yates*, 1 H. & N. 73; 25 L. J. Ex. 237.

(*k*) *Lara v. Gen. Apoth. Co.*, 26 L. J. Ex. 225; *ante*, p. * 5.

case is not bound to enter upon his task; nor is the other party bound to provide the work and pay the hire. But when the work has been actually done, the person at whose request and by whose orders it was executed must pay for it, although the workman was originally under no legal obligation to do the work, nor the employer to employ him. The law generally implies a promise from the employer to pay a reasonable compensation for services rendered, unless it appears that the services were to be gratuitous, or that *the work- [*385] man relied for payment upon a particular fund, and not upon the personal responsibility of the employer. (*l*) When a person has, by fraud, induced another to perform a service for him, intending not to pay for the performance of it, still there is a liability implied by the law, which may be enforced in the same way as an obligation arising out of an express contract. (*m*)

Work and Services in preserving a Lost Chattel, and restoring it to the Owner.¹ — Doubts have at different times been expressed as to whether a person who has voluntarily bestowed his own labor and services and incurred expense in the recovery and restoration of a lost chattel to the owner, is entitled to an action to recover compensation and remuneration therefor. (*n*) In the case of the recovery and restoration of shipwrecked property he is clearly entitled to such a compensation; and there seems to be no valid reason for confining this right of reward to cases of salvage from shipwreck.

"In the French law," observes Domat, "he who receives back a thing which he had lost is obliged, on his part, to reimburse

¹ As to right of action for a reward offered for finding and returning a lost chattel, upon performance of the service, see *ante*, p. *24, American note.

That the finder's title to the thing found is good against all persons but the true owner or those claiming under him, see *Durfee v. Jones*, 11 R. I. 588; *Hamaker v. Blanchard*, 90 Pa. St. 377; *Bowen v. Sullivan*, 62 Ind. 281.

When converting a chattel found to his own use is larceny in the finder. *Griggs v. State*, 58 Ala. 425, *Brooks v. State*, 35 Ohio St. 36; *Bailey v. State*, 58 Ala. 414; *State v. Dean*, 49 Iowa, 73.

(*l*) *Ante*, p. *21; *Poucher v. Norman*, 3 B. & C. 744; *Parke, B., Higgins v. Hopkins*, 3 Exch. 166; *Hingston v. Kelly*, 18 L. J. Ex. 360; *Alexander v. Worman*, 6 H. & N. 100; 30 L. J. Ex. 198.

(*m*) *Rumsey v. N. E. Ry. Co.*, 14 C. B. N. S. 641; 32 L. J. C. P. 244.

(*n*) *Lampleigh v. Braithwaite*, 1 Smith's L. C. 5th ed., 135.

the finder the expenses incurred by him in the preservation and restoration of the thing lost, such as the expense of feeding a strayed beast which required nourishment, or the carriage and conveyance of the thing lost to some place of safety, or the expense of advertisements, or the publication of printed notices in order to give information to the owner." (o) If the owner is present and cognizant of the exertions made to recover his lost property, it will be a question of fact whether there was or was not an implied request on his part for the performance of the service actually rendered, and a tacit understanding between the parties that the person doing the work should be rewarded for his pains.

Salvage Services.—In order to encourage persons to lend their aid and assistance for the protection and preservation of property and life from shipwreck, the law gives to the parties by whose labor and assistance the property or lives have been saved from impending peril, a claim to a fair and reasonable compensation for their services, and a right to retain the property until they have received it. (p) This compensation is called salvage, a term derived from the French word *salver*, or *sauver*, to save.

The amount of salvage payable in the case of the recovery of property lost by shipwreck or abandoned at sea (q) depends upon the value of the thing saved, the degree of danger of loss, and the amount of labor and skill employed in saving it. Some maritime codes have proportioned the amount to the value of the thing saved, without reference to the surrounding circumstances of the case; but this is obviously unjust; and our own law, therefore, merely directs as a general principle that a fair and reasonable compensation shall be made. (r) If the salvors are guilty of misconduct, and occasion injury to the ship and cargo by rescuing the vessel from one danger only to run her into another, the claim for salvage will be lost. (s) But if success is finally obtained, no mere mistake or

(o) Domat, liv. 2, tit. 9, sect 2, No. 25; The Phantom, L. R. 1 Adm. 2; Dig. lib. 47, tit. 2, lex 43, sect. 8.

(p) Hartfort v. Jones, 1 Raym. 393; Salk. 654, pl. 2; 17 & 18 Vict. c. 104, sects. 458-470; 24 Vict. c. 10, sect. 9; 25 & 26 Vict. c. 63, sect. 59; The Fusilier, 2 Moo. P. C. n. s. 51; 34 L. J. Adm. 189; The Thomas Fielden, 32 L. J. Adm. 61.

(q) The Genessee, 12 Jur. 401.

(r) The Otto Hermann, 33 L. J. Adm. 189; The Thomas Fielden, 32 L. J. Adm. 61.

(s) The Dosseitei, 10 Jur. 865.

error of judgment in the manner of procuring it, and no misconduct short of that which is wilful and may be considered criminal on the part of the salvors, will work an entire forfeiture of the salvage. Mistake or misconduct, not wilful but diminishing the value of the property salvaged or occasioning expense to the owners, will, however, be considered in estimating the amount of compensation to be awarded. (*t*) There can be no claim to salvage where the efforts to save have not been attended with success. (*u*) A man cannot entitle himself to salvage in respect of services which have been rendered contrary to the express wishes and directions of the owner, and has no right to interfere with persons employed by the owner to save the property. (*x*) And if one set of men have taken possession of a vessel abandoned at sea and are endeavoring to preserve it, another set have no right to molest them and become participators in the salvage, unless it appears that the first would not have been able to effect the purpose without the aid of the others. (*y*) A passenger is not entitled to claim salvage in respect of that ordinary assistance to a vessel in distress which it is the interest of all persons on board to give, for the purpose of avoiding the common danger. (*z*) But for extraordinary services rendered and dangers incurred for the preservation of the vessel, the passenger is as much entitled to salvage as a mere stranger. (*a*) And salvage service may be performed even by the seamen of the ship salvaged, when an abandonment of her has put an end to their original contract. (*b*) So also salvage services may be rendered by a pilot where they have put off to sea to help a vessel, the test not * being whether the vessel was at the time of succor [* 387] in distress or damaged, but whether the pilot could be expected to incur the risk for only pilotage reward. (*c*) Where both ships belong to the same owner, the master and crew of the

(*t*) *The Atlas*, 15 Moo. P. C. 329.

(*a*) *Newman v. Walters*, 3 B. & P.

(*u*) *The Edward Hawkins*, 31 L. J. Adm. 46; *The Atlas*, 31 L. J. Adm. 210. But if men are engaged by a ship in distress, it is otherwise; see *The Undaunted*, Lush. 90.

612.

(*b*) *The Vrede*, 30 L. J. Adm. 209; *The Le Jouet*, L. R. 3 A. & E. 556; 41 L. J. Adm. 95.

(*c*) *Sutton v. Buck*, 2 Taunt. 312.

(*c*) *Akerbloom v. Price*, 7 Q. B. D. 129; see *The Anders Knape*, L. R., 4 P. D. 213.

(*y*) *Abbott*, 495.

(*z*) *The Branstons*, 2 Hag. 3; *The Vrede*, 1 Lush. 322; 30 L. J. Adm. 209.

ship which has performed the services are entitled to salvage, provided the services performed are not within the contract which they originally entered into with the owners. (*d*) And the owners of a salving vessel are entitled to remuneration, although some of them are also owners of the vessel which did the mischief. (*e*) An agreement for salvage which is reasonable at the time it is made, is valid, notwithstanding circumstances may render the services more expensive or hazardous than was anticipated. (*ee*) By the 17 & 18 Vict. c. 104, sect. 182, every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage, is wholly inoperative; (*f*) but by the 25 & 26 Vict. c. 63, sect. 18, this is not to apply to the case of any agreement made by the seamen belonging to any ship which by the terms of the agreement is to be employed on salvage service. Compulsion or fraud will avoid a contract as to salvage. (*ff*) Persons who merely furnish boats, tackle, or other articles of use for salvage purposes, are not entitled to be paid as salvors, but for the use of the articles they have supplied. (*g*) There is no distinction between river salvage and sea salvage, the danger and meritorious nature of the services in either case being the ground on which the compensation is awarded. (*h*)

Services by Trustees. — The law raises no implied promise of remuneration in respect of services of a fiduciary character. (*i*) If, therefore, a solicitor consents to act as a trustee of property, and renders professional services in matters relating to the trust estate confided to him, he is not entitled to charge for such services, whether he acts for himself alone, being sole trustee, or for himself and others who are his co-trustees, unless there is a provision in the deed or will creating the trust enabling him to

(*d*) *The Sappho*, L. R. 3 P. C. 690; appportionment; see *The Afrika*, L. R. 5 40 L. J. P. C. 48; *The Scout*, L. R. 3 A. P. D. 192.
& E. 512; 41 L. J. Adm. 42.

(*e*) *The Glengabeer*, L. R. 3 A. & E. 5 C. A.
534; 41 L. J. Adm. 84.

(*ee*) *The Waverley*, 40 L. J. Adm. 42.
42.

(*f*) *The Rosario*, L. R. 2 P. D. 41.
Seamen may, however, arrange for an

(*ff*) *The Medina*, L. R. 2 P. D. 5 C. A.
(*g*) *The Charlotte*, 12 Jur. 568.
(*h*) *The Carrier Dove*, 2 Moo. P. C. N. s. 243; and see *Nicholson v. Chapman*, 2 H. Bl. 258.
(*i*) *Barrett v. Hartley*, L. R. 2 Eq. 789.

receive remuneration for the transaction of such business; but he is entitled to charge the trust estate with costs out of pocket. (*k*) A trustee moreover, is not allowed to make the execution of the trust a source of profit * to himself, [* 388] and cannot sue upon an express contract between him and his co-trustees for payment for his services to the trust; for each trustee is to be a check and control upon each and all the co-trustees; and one of them cannot authorize another to make professional charges to be paid out of the trust fund. Where, therefore, a number of trustees appointed one of their own body, who was a lawyer, "factor to the trust," with an allowance for his necessary charges and expenses and a "reasonable gratification," and the factor sued his co-trustees for his professional charges "by reason of their having employed him as their commissioner, factor, cashier, and attorney in the aforesaid trust," it was held that he was not entitled to recover these charges either from them or from the trust estate. (*l*) Where one of several solicitors in partnership has taken upon himself the office of trustee, the firm of which he is a member cannot charge for professional services rendered by them in the execution of the trust. (*m*)

In a recent case where it was proved that the partner of a trustee had, as solicitor to the trust, transacted the whole trust business entirely on his own account and for his own exclusive benefit, under an arrangement which had been made between him and his partner, that they should not be partners in any matters relating to the trust property, but that the partner who was not a trustee should, in all matters relating to the trust, act as sole solicitor to the trust, and be entitled to receive, for his own exclusive benefit, all costs and charges which might be incurred in the execution of the trust, the professional charges of the partner were allowed to be paid out of the trust estate. (*n*)

Promises of Presents in Return for Services.—If services have been rendered and benefits conferred on the express under-

(*k*) *Moore v. Frowd*, 3 Myl. & Cr. 45; *supra*; *Aberdeen Ry. Co. v. Blaikie*, 1 Christophers v. White, 10 Beav. 523; *Macq. H. L. C.* 461; *post*, * 825.
Manson v. Baillie, 2 Macq. H. L. C. 80, (*m*) *Collins v. Carey*, 2 Beav. 128;
 overruling *Craddock v. Piper*, 1 Mac. & Broughton v. Broughton, 5 De G. M. & G. 664. G. 160.

(*l*) *Manson v. Baillie*, 2 Macq. H. L. (*n*) *Clack v. Carlon*, 30 L. J. Ch.
C. 80, questioning *Craddock v. Piper*, 639.

standing that the person rendering the services is to trust entirely to the generosity of the party benefited, and not to look for payment as a right, there is no contract. (*o*) But if a person promises to make a present in return for services rendered, there is evidence of a contract to pay a reasonable sum. (*p*)

Honorary and Gratuitous Services.—If the employment is by custom and usage of a purely honorary and gratuitous character, the *prima facie* presumption of a letting and hiring of the services is rebutted as soon as the custom is proved [* 389] and established. The *office of an arbitrator is deemed to be an honorary office; and a person who acts as such cannot charge for his services, unless it appears from the terms of the submission or the surrounding circumstances of the transaction that it was the intention of the parties that the arbitrator should be paid for his time and trouble, or unless there is an express promise to pay him for his services. (*q*) Barristers likewise exercise an office and profession of an honorary character. They are presumed in law not to afford their professional services with any mercenary view, and cannot, therefore, maintain an action for remuneration for advice or advocacy in matter of litigation, or for services ancillary to the service of an advocate, although there be an express contract to pay them a stipulated sum for such service; (*r*) but in cases unconnected with advocacy, and for services not of a professional character, a barrister may, it seems, contract for remuneration. A physician may sue for his services, if he is registered as a physician under the Medical Act, and is not prohibited by the college to which he belongs from bringing an action for his charges. (*s*) If the service appears to have been rendered as a gratuitous act of

(*o*) *Roberts v. Smith*, 4 H. & N. 321; 28 L. J. Ex. 164; *Taylor v. Brewer*, 1 M. & S. 190.

(*p*) *Jewry v. Busk*, 5 Taunt. 302; *Bryant v. Flight*, 5 M. & W. 114; *Bird v. M'Gaheg*, 2 C. & K. 708.

(*q*) *Virany v. Warne*, 4 Esp. 47; *Hoggins v. Gordon*, 3 Q. B. 471.

(*r*) *Kennedy v. Broun*, 13 C. B. N. S. 677; 32 L. J. C. P. 137; *Broun v. Kennedy*, 33 L. J. Ch. 71, 342; 33 Beav.

133; *Hobart v. Butler*, 9 Ir. C. L. R. 157; *Morris v. Hunt*, 1 Chitt. 551; *Veitch v. Russell*, 3 Q. B. 928; *Egan v. Guard. Kens. Un.*, ib. 935, n.; *Atty.-Gen. v. The Royal College of Physicians* 1 Johns. & H. 561, 591; 30 L. J. Ch. 757; *Mostyn v. Mostyn*, L. R. 5 Ch. 457; 39 L. J. Ch. 780.

(*s*) 21 & 22 Vict. c. 90, sect. 31; *Gibbon v. Budd*, 2 H. & C. 92; 32 L. J. Ex. 182.

kindness, or in discharge of a public duty, the *prima facie* presumption of a contract of letting and hiring is repelled. Thus if a man undertakes a journey to become bail for his friend, (t) or attends as a witness in a court of justice, he is not entitled to be paid for his trouble. In the last case, as the attendance to give evidence is a duty of a public nature, an express promise to remunerate the witness for so doing is invalid; but the witness is entitled to compensation according to the scale framed by the judges under the Common Law Procedure Acts. (u)

The law raises no implied promise of remuneration in respect of the services of public officers. If by statute or immemorial usage a public officer is entitled to fees for his services he may maintain an action to recover them; but where a duty is imposed by statute upon a public officer, and no provision is made for the payment of any remuneration, no action can be maintained for the recovery of any remuneration. (x)

Rights and Liabilities of Employer and Workman. — A person who employs another by the piece or by the job, or who lets out *task-work to be done for an express or [*390] implied remuneration, is, in general, bound to do everything that is necessary to be done on his part to enable the hirer of the work to execute his engagement and earn the hire or reward. He impliedly undertakes to resort to no misrepresentation or concealment calculated to mislead the servant or undertaker of the work and give him a false estimate of the nature and extent of it, to accept the work when completed, and to pay the customary hire, in case no specific rate of remuneration has been agreed upon. When there is an absolute and unqualified refusal on the part of the employer to permit the workman to perform his task, or the employer does an act absolutely incapacitating himself from performing his part of the engagement, the undertaker of the work has a right, if he has done anything under the contract, to sue immediately, for remuneration on a *quantum meruit* if the contract is defeasible, or if not, for compensation for the damage he has sustained in being prevented from earning the stipulated hire. (y)

(t) Reason v. Wirdnam, 1 C. & P. 434.

(x) Jones v. Caermarthen (Mayor),

(u) Nokes v. Gibbon, 26 L. J. Ch. 8 M. & W. 605.

(y) Planché v. Colburn, 1 M. & Sc.

Defeasible Contracts for Work and Services. — If a laborer is employed to dig potatoes at so much an acre, or to cut turf at so much a load, or to make excavations of earthwork at so much per cubic foot, the employer may, if there is no determinate term or employment, dispense, at any time, with the future services of the workman, paying him for the work actually done. If a party employs a factor or agent to collect his rents, or transact his business for him, for certain commission or reward, the employment is determinable at the will of the employer, unless it is coupled with an interest, and the party employed is something more than an agent in the transaction. If an agent is employed to sell property on commission, it is competent to the employer, at any time before a sale has been actually effected, to revoke the authority and deprive the agent of the expected commission; (1) but if expenses have been incurred by the agent in executing the authority entrusted to him, he will be entitled to recover such expenses from the employer, and also a reasonable compensation for any labor or trouble he may have undertaken in endeavoring to execute his commission, unless it appears to have been the understanding of the parties that nothing was to be paid unless the act authorized to be done was fully accomplished. (a) If a commission agent employed to sell property has found a purchaser and effected the authorized contract of sale, he will be entitled to his commission, although [*391] *the employer may refuse to fulfil the contract; and if he has found a party willing to buy, and the employer is then unable or unwilling to sell, the agent will be entitled to remuneration for his services. (b)

Time of Performance. — By the Judicature Act, 1873, sect. 25 (7), stipulations in contracts as to time or otherwise which would not before the passing of this act have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and

51; *Emmens v. Elderton*, *just.*, p. *464; (a) *Moffatt v. Laurie*, 15 C. B. 583; *Prickett v. Badger*, 1 C. B. N. S. 304; *De Bernardy v. Harding*, 5 Exch. 522; *Inchbald v. Western*, *Neilgherry Coffee Co.*, 17 C. B. N. S. 733; 34 L. J. C. P. 24 L. J. C. P. 13.

15. (b) *Prickett v. Badger*, 1 C. B. N. S.

(c) *Simpson v. Lamb*, 17 C. B. 603; 296.
25 L. J. C. P. 113.

effect as they would have heretofore received in equity. Time is frequently of the essence of the contract as regards the commencement of the work ; but not so with regard to its completion. If it is made a positive term of the contract that the work shall be commenced on a day named, the employer may refuse the services of the workman, and decline to employ him, if he does not tender his services or commence the work at the appointed period ; but when the work has been commenced, the completion of it by a day named will not in general be a condition precedent to the workman's right to the stipulated hire. When the materials for the work, for example, have been furnished by the employer, and the produce of the labor becomes, consequently, the property of the latter as the work proceeds, the non-performance of the work by an appointed time does not release the employer from his obligation to pay the contract price. He must in such a case perform his part of the engagement, and bring a cross-action against the undertaker of the work to recover compensation for any damage he may have sustained by reason of the non-completion of the work at the appointed period. (c) If after the time of completion the employer urges the continuance of the work, or encourages the workman to proceed, he waives the condition as to time. (d)

Entire Performance of a Contract for Work is often a Condition Precedent to Payment. — Thus, if a coachman agrees to convey a passenger from London to York for a certain stipulated remuneration, and carries him only half the distance, he is not entitled to any payment, the precedent act to be performed being entire and indivisible. Where the plaintiff undertook to make "complete" certain dilapidated chandeliers for the sum of £10, and returned them in an incomplete state, it was held that he could not maintain an action for the work actually done. (e) And where an attorney covenanted to pay his clerk 2s. for every quire of paper he copied out, it was held that this was an entire covenant, of which no apportionment could be made *pro rata*, and that the clerk, * consequently, could not main- [* 392] tain an action to recover remuneration for copying out

(c) Lucas v. Godwin, 4 Sc. 509.

(e) Sinclair v. Bowles, 4 M. & R. 3;

(d) Burn v. Miller, 4 Taunt. 748.

9 B. & C. 94.

any number of sheets less than a quire. (*f*) So where the plaintiff offered to cure a flock of sheep and lambs of a disease called the scab, at so much per head for the sheep, and so much for the lambs, and stated that he did not expect to be paid unless he cured *all* the sheep and lambs; whereupon the defendant accepted his offer, and agreed to employ him; and the plaintiff, after he had materially checked the complaint, but before he had cured the whole of the flock, brought his action for the money; it was held that he was not entitled to recover anything for his pains. (*g*)

Divisible and Apportionable Work.— But if the work is in its nature divisible and apportionable, and there is nothing in the terms of the contract which, either by express stipulation or necessary intendment, precludes the plaintiff from recovering in respect of a partial execution of it, the plaintiff may, on performing a part only of his engagement, require a corresponding part performance on the part of the defendant. (*h*) Thus, where a ship, being damaged at sea, put into a harbor to receive some repairs, and an agreement was made with a shipwright to put her “into thorough repair,” but nothing was said as to the amount, or time, or mode of payment, and before the repairs were completed the shipwright demanded payment for what he had done, it was held that the contract was not an entire contract to do the whole of the repairs and make no demand for payment until they were completed, but that the shipwright might from time to time, in the course of the work, demand payment for what he had done, before proceeding to complete the residue. (*i*) And if in a contract of this description the defendant is deprived by accident of the benefit of the work before it is finished, the workman is not by reason of such accident, deprived of his right to remuneration. (*l*)

Building Contracts.¹— If a contract has been entered into to

¹ See U. S. Dig. tit. *Contracts*, III. V. IX.; Ann. Dig. 1870–1878, tit. *Contracts*, II. IV.; Ann. Dig. 1879, &c., tit. *Contracts*, II. V.

(*f*) *Needler v. Guest*, Ayleyn. 9.

(*i*) *Roberts v. Havelock*, 3 B. & Ad.

(*g*) *Bates v. Hudson*, 6 D. & R. 3. 404.

(*h*) *Taylor v. Laird*, 1 H. & N. 266;

(*l*) *Menetone v. Athawes*, 3 Burr.

25 L. J. Ex. 329; *Button v. Thompson*, 1592.

L. R. 4 C. P. 330.

build a house for a specific sum, to be paid on the completion of the building, the contract is entire and indivisible, and the employer is not bound to pay for a half or a quarter of a house; for the court and jury can have no right to apportion that which the parties themselves have treated as entire. But where a builder engages to build a house, to be paid for his work and labor and the materials supplied by measure and value, or according to the customary rate of remuneration, he is entitled to demand payment from time to time as the work proceeds. [* 393] Every builder who contracts for the building of a house impliedly undertakes to furnish everything reasonably necessary for its completion. (m) Where an action was brought by a builder against his employer upon a special contract for the building of a house for a certain sum, and the builder had omitted to put into the building certain joists according to his contract, it was contended that, as the employer had got the benefit of the house, he was bound to pay what it was fairly worth; but, *per* Mansfield, C. J., "The defendant made no such agreement. He says, 'I agree to pay you, if you would build my house in a certain manner, which you have not done.' The plaintiff cannot now be permitted to turn round and say, 'I will be paid by a measure and value price instead of the contract price.'" (n) If an architect, employed to prepare plans and specifications for a house, and to procure a builder to erect it, takes out the quantities, and represents to a builder that they are correct, and the builder thereupon makes a tender which is accepted, the builder cannot upon these facts alone recover more than the contract price from the employer, although it turns out that the quantities are wrong, and the builder has expended upon the building a much larger amount of material than he contemplated. (o)

Work to be approved of before Payment. — If a tailor undertakes to make me a coat, or a coachbuilder to build me a carriage, upon the terms that I am not to take and pay for it, if, on inspection, I disapprove of the style and workmanship, I am at liberty to return the coat or the carriage, and refuse payment of

(m) *Williams v. Fitzmaurice*, 3 H. & N. 844.

(o) *Scrivener v. Pash*, L. R. 1 C. P. 715.

(n) *Ellis v. Hamlen*, 3 Taunt. 52.

the price, if I think fit so to do. But if I engage an artist to work up my own materials, or to paint a ceiling in my house, and I have, consequently, no opportunity or power of returning him the produce of his labor, I cannot make my approval of the work a condition precedent to his right to demand some remuneration for what he has done. (*p*) If a contract for the building or repairing of a house provides for the inspection and approval of the work by the employer before payment of the contract price, the employer must be afforded an opportunity of inspection before he can be called upon to pay; but he cannot, by withholding his approval unreasonably and *mala fide*, after an opportunity of inspection has been afforded him, deprive the workman of his hire. (*q*) The employer has, indeed, a [* 394] right in all cases to inspect the work before he pays * for it; but his approval of a builder's work is by no means essential to the maintenance of an action by the builder. It will always be a question for the jury to determine, whether the employer has acted *bona fide*, and ought reasonably to have been satisfied with the work done. (*r*) But where the workman works up his own materials in the manufacture of a chattel, the employer may reserve to himself a right to rescind the contract and reject the chattel, if he finds, on trial or inspection, that it does not suit him, either on the score of workmanship, or of convenience or taste. (*s*) If his acceptance of an engine, or machine, and payment of the contract price, are made dependent upon his approval of the strength and soundness of the workmanship, and he rejects the machine because it does not work well, or does not answer his purpose, and not because it is deficient either in strength or soundness, he will be held responsible for the price. (*t*)

When the Right to receive Payment is made dependent upon the Approval of an Architect or Surveyor, or the production of a

(*p*) *Andrews v. Belfield*, 2 C. B. N. S. 779. rendrait cette clause nulle et illusoire." — POTH. *Louage*, No. 417.

(*q*) *Dallman v. King*, 5 Sc. 382; "Ces termes, si je suis content de l'ouvrage, ne doivent pas être entendus en ce sens, que le locateur puisse être admis indistinctement, à dire qu'il n'est pas content de l'ouvrage, pour se dispenser de payer la gratification promise, ce qui 1078.

(*r*) *Parsons v. Sexton*, 4 C. B. 899; 16 L. J. C. P. 184; *Hughes v. Lenny*, 5 M. & W. 193.

(*s*) *Andrews v. Belfield*, 2 C. B. N. S. 779.

(*t*) *Ripley v. Lordan*, 6 Jur. N. S. 1078.

certificate that the work has been done according to contract, no right can arise which can be enforced until the approval has been given or the certificate has been obtained. (*u*) Work, therefore, which has been done, but not to the satisfaction of the surveyor or architect, cannot be charged for; (*v*) but if the certificate is fraudulently or corruptly withheld, the court will give relief; and an action may, in certain cases, be maintained for the malicious, corrupt, or fraudulent withholding of the certificate both against the architect and against the employer. (*w*) If the certificate is not, by the express terms of the contract, required to be in writing, the architect's approbation, testified by word of mouth, is sufficient.¹ (*x*)

Relief against Biased or Corrupt Decisions of Architects and Surveyors. — If an architect's certificate is wrongfully or fraudulently withheld, the court will give relief, not only against the parties who are bound to pay, but also against the architect, surveyor, or engineer; and any stipulation in the contract, placing the latter in the position of an arbitrator between the employer and the workman, and making his decision final, and purporting to exclude the jurisdiction of any court with reference to his conduct, will be nugatory and of no effect. (*y*) If questions arising between the *contractor for works and the [*395] employer are, by the contract, left to the determination of the architect, and the latter has a personal interest unknown to the contractor and adverse to him, (*z*) or does not act fairly between the parties, or manifests any undue leaning, bias, partiality, or corruption, the court will review his decision and interfere to give relief, however strenuously the parties may by their contract have endeavored to exclude the jurisdiction. (*a*)

¹ See *post*, p. * 1189, American note.

(*u*) *Scott v. Liverpool Corp.*, 25 L. J. Ch. 230; *Morgan v. Birnie*, 3 M. & Sc. 76; 9 Bing. 672; *Mayor, &c. of Salford v. Ackers*, 16 L. J. Ex. 6; *Moffatt v. Dickson*, 22 ib. C. P. 268; 13 C. B. 543. (*v*) *Dobson v. Hudson*, 1 C. B. N. s. 659; 26 L. J. C. P. 153. (*w*) *Milner v. Field*, 5 Exch. 829; 20 L. J. Ex. 68; *Batterbury v. Vyse*, 2 H. & C. 42; 32 L. J. Ex. 177; *Stadhard v. Lee*, 3 B. & S. 364; 32 L. J. Q. B. 75. (*x*) *Roberts v. Watkins*, 32 L. J. C. P. 291; 14 C. B. N. s. 592. (*y*) *Scott v. Liv. Corp.*, 25 L. J. Ch. 227. (*z*) *Kimberley v. Dick*, L. R. 13 Eq. 1; 41 L. J. Ch. 38. (*a*) *Kemp v. Rose*, 1 Giff. 258; *Scott v. Liv. Corp.*, *supra*; *Ormes v. Beadel*, 2

Actions for wrongfully withholding the Certificate may be maintained both against the architect and the employer, if it can be proved that the builder has fulfilled his contract and done all things necessary to be done by him to entitle him to the certificate, and that the architect had full knowledge thereof, and nevertheless neglected to certify, in collusion with and by the procurement of the employer. (*b*) But the employer is not responsible for any misconduct of his architect or surveyor in refusing to certify not brought about by his instrumentality or interference. (*c*)

Effect of the Employer's taking Possession and making Use of the Unfinished Work. — A landowner who by a building contract provides a site for the erection of a house, and delivers the ground to the builder, does not thereby part with the possession of his land. The builder has the mere temporary custody of it, and may be turned off at any time by the employer. (*d*) Where by a building contract it was stipulated that certain houses should be built on the land of the employer for a certain sum by a specified day to the satisfaction of a surveyor, upon whose approval payment was to be made, and the builder became bankrupt and was unable to complete the houses, and the employer then took possession of them and finished them, it was held that his taking possession of the unfinished houses did not amount to a waiver of the contract or of any of the terms or conditions thereof, and afforded no evidence that he accepted the benefit of the work actually done under an implied contract to pay for it according to measure and value. (*e*)

Defective Work accepted by the Employer. — Whenever the employer has accepted and retains the benefit of work done for him under a special contract, which has been abandoned [** 396*] or rescinded, * and remains no longer a subsisting contract, he is liable to pay a reasonable remuneration in

Giff. 166; 30 L. J. Ch. 1; Pawley v. (c) Clarke v. Watson, 18 C. B. N. s. Turnbull, 3 Giff. 70; Bliss v. Smith, 34 278; 34 L. J. C. P. 148.
Beav. 508.

(b) Batterbury v. Vyse, 2 H. & C. 42; (d) The Marquis Camden v. Batterbury, 5 C. B. N. s. 508; 7 C. B. N. s. 32 L. J. Ex. 177; Milner v. Field, 5 878; 23 L. J. C. P. 335.

Exch. 829; 20 L. J. Ex. 68; Scott v. (c) Munro v. Butt, 8 Ell. & Bl. 738; Liv. Corp., 25 L. J. Ch. 230. Runger v. Gt. West. Ry. Co., 5 H. L. C. 118.

respect thereof. If the workman undertakes to repair a chattel, the property of the employer, and the new work and materials are so intermixed with the old work, that the one cannot be separated from the other without injury to the chattel, so that the employer must of necessity accept the work, his liability to pay for it, in case it has been negligently and unskilfully executed, depends upon the utility or inutility of the work. If the chattel has been benefited and rendered more valuable by what has been done, the employer must pay the fair value of the workmanship; if it is in no wise improved, and the work done has been so negligently executed as to be worth nothing, the employer cannot be called upon for payment. If the contract is an entire and indivisible contract for the completion of certain work, such as the contract to "make complete" the dilapidated chandeliers for the sum of £10 previously mentioned (*ante*, p. *391), and the chattel is returned in an unfinished state, the employer may require the undertaker of the work to complete and perfect the article, and refuse payment of the money until it is done. The retention by the employer of his own unfinished chattel does not, in such a case, raise any inference of a waiver of any of the terms or conditions of the special contract, or of the entering into a new contract to pay upon a *quantum meruit*. (*f*)

Substantial Performance of Building Contracts.—When a contract has been entered into for the building of a house for a certain sum of money to be paid on the completion of the building in accordance with certain plans and specifications, it is not essential to the maintenance of an action upon the contract that there should be an exact performance of the contract in every minute particular; for, wherever divers acts and things of different degrees of importance are to be done on one side in return for a stipulated remuneration on the other, the performance of all the things in every minute particular is not, in general, a condition precedent to the liability to make some remuneration; but if the contract has been substantially fulfilled, the plaintiff is entitled to maintain an action upon it, (*g*) the defendant being entitled to such a deduction from the contract price as will

(*f*) *Munro v. Butt*, 8 Ell. & Bl. 752; (*g*) *Ante*, p. *190.
Ellis v. Hamlen, *ante*, p. *393.

enable him to complete the work in exact accordance with the contract. In every contract for work there is a condition implied by law that the work shall be done in a proper and workmanlike manner; but this is not a condition going to the essence of the contract. "If it were a condition precedent to the plaintiff's remuneration," observes Tindal, C. J., "a [*397] * little deficiency of any sort would deprive the plaintiff of all claim for payment; but under such circumstances a jury may say what the plaintiff really deserves to have." (*h*)

A building contract, with all its specifications and details, may be broken to the letter with trifling damage to the employer; and if performance in every minute particular were made a condition precedent to the builder's right to sue upon the contract for work done, "a trifling injury to the one party might occasion the loss of all remuneration to the other for a long and laborious service." (*i*) But where it appears from the whole tenor of the agreement that the parties thereto intended, the one to insist upon, and the other to submit to, conditions, however unreasonable and oppressive, the court will in such case give effect to them. (*j*)

Where a party engages to do certain work on certain specified terms and in a certain specified manner, but does not perform the work so as to correspond with the specification, he is not entitled to recover the price agreed upon in the specification, nor can he recover according to the actual value of the work done, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work to make it correspond with the specification. (*k*) And the defendant is not, by reason of his having given evidence of such breach of contract on the part of the plaintiff, and obtained a reduction of the agreed price, according to the difference between the value of the work actually done and that which ought to have been done according to the

(*h*) *Lucas v. Godwin*, 3 Bing. N. C. 744; 4 Sc. 509.

(*i*) *Tindal, C. J., Stavers v. Curling*, 3 Sc. 755.

(*j*) *Stadhard or Stannard v. Lee*, 3 B. & S. 364; 32 L. J. Q. B. 75.

(*k*) *Thornton v. Place*, 1 Mood. & Rob. 218.

contract, precluded from bringing his cross action to recover compensation for any special damage he may have sustained by reason of the non-compliance by the plaintiff with the strict terms of the engagement. (*l*) Although the defendant may give evidence of such breach of contract in reduction of damages, he is not bound to do so, but may pay the whole of the contract price, and bring a cross action for damages for the non-performance and defective performance of the work done. (*m*) Care must be taken to mark the distinction between an action on the special contract itself for the agreed price of the work, and an action upon a bill of exchange or promissory note given by way of payment of the amount. In the former the value of the work only can be recovered; in the latter * the [* 398] party holding bills given for the price of the work done can recover on them, unless there has been a total failure of the consideration. If the consideration fails partially, as by the inferiority of the work, the buyer must seek his remedy by a cross action. The contract may be divisible; but the security is entire. (*n*) Where plans and specifications are prepared and persons invited to tender thereupon, there is no implied warranty that the work can be successfully done according to such plans and specifications. (*o*)

Abatement of the Contract Price. — Whenever a contract for work and services on the one side, and payment on the other, has been so far executed as to give rise to a cause of action in respect of the work done, but has not been fully performed, it is competent to the defendant to show, in reduction of the price agreed to be paid, that the subject-matter of the contract is diminished in value by reason of the incomplete and inefficient execution of the work by the plaintiff. Thus, where the plaintiff agreed to erect a powerful warm-air apparatus in a chapel, and the defendant agreed to pay him the sum of £70 for so doing, and the claim for the money was resisted on the ground that the apparatus was imperfect and did not answer, it was held

(*l*) *Post*, p. *955; *Mondel v. Steel*, 8 M. & W. 858; *Rigge v. Burbridge*, 15 M. & W. 599.

(*m*) *Davis v. Hedges*, L. R. 6 Q. B. 687.

(*n*) *Tye v. Gwynne*, 2 Campb. 347.

(*o*) *Thorn v. Mayor of London*, 1 Ap. Cas. 120.

by Tindal, C.J., that if the apparatus was altogether unfit for the purpose, and did not at all answer the end for which it was intended, the defendant was not bound to pay for it; but that if the apparatus was in the main effective, but not quite so complete as it ought to have been according to the contract, the action was maintainable for the price, and that the jury might deduct from the full price such a sum as would enable the defendant to do that which was required to make it complete and perfectly effective. (*p*)

Effect of Non-performance of Building Contracts by the Time specified. — In the case of a contract to build a house, where the employer furnishes the land, which is the principal material for the work, if the house is not built by the time specified in the contract, but is afterward completed, the employer who has got the house, and has had the value of his land increased by its erection thereon, can never be permitted to free himself from his obligation to pay for it by alleging that the work was not done by the time appointed. The stipulation as to time is not, in such a case, “a condition going to the *essence* of the contract. The parties never could have contemplated that, if the house were not completed by the day named, the builder should have no remuneration; at all events, if an engagement so un-
[* 399] reasonable was contemplated, * the parties should have expressed themselves with a precision that could not be mistaken.” (*q*)

Penalties for Non-performance of Building Contracts by a Time specified. — Where, by articles of agreement for the altering and repairing of a warehouse for a fixed sum, it was stipulated that, in the event of the work not being fully completed in three months, the builder should “forfeit and pay” to the employer £5 every week he should be engaged in such work beyond the three months, such penalty or forfeiture to be deducted from the amount which might remain owing on the completion of the work, it was held, in an action brought for extra work, that the employer was entitled to set off the penalty against the price

(*p*) Cutler v. Close, 5 C. & P. 338; Holland, 3 T. R. 590; Maryon v. Carter, Chapel v. Hickes, 2 Cr. & M. 214. 4 C. & P. 295; Kingdom v. Cox, 2 C. B.

(*q*) Tindal, C. J., Lucas v. Godwin, 661; 15 L. J. C. P. 95.
4 Sc. 509; 3 Bing. N. C. 744; Littler v.

of such extra work, and that he had a double remedy, either to set it off as payment, or to deduct it from the contract price. (*r*) If performance by the time specified has been prevented by the ordering of extra work, or by the interference of the employer or his agent, the claim to the penalties cannot be enforced, (*s*) unless there is an express stipulation that they may be. (*t*)

Of the Giving of Security for the Due Performance of the Contract. — If security is to be given by the workman for the due performance of his contract, the giving of the security is a condition precedent to any liability on the part of the employer upon the contract, unless the condition has been waived by the workman's being required to proceed with the work, or the work having been executed, without security. (*u*)

Destruction of Work before Payment — Loss of Materials, and Loss of the Price of the Work. — If the contract is entire for the performance of a specific work for a specified sum, so that the performance of the whole of the work bargained for and agreed to be done is a condition precedent to the right to payment for any part of it, the workman will be deprived of all legal right to remuneration if the work is destroyed by accident before it has been completed; (*x*) but if the workman is entitled to payment from time to time as the work proceeds, the destruction of the work before its completion will not deprive the workman of his hire. Thus if the contract is an entire and indivisible contract for the building of a house for a specific sum to be paid on its completion, and the * edifice is [* 400] destroyed by lightning, fire, or tempest, during the progress of the work, the contractor must stand to the loss, and be himself at the expense of repairing the damage. But if the contract price of the building is to be paid by instalments on the completion of certain specified portions of the work, each instalment becomes a debt due to the builder as the particular portion

(*r*) *Duckworth v. Alison*, 1 M. & W. 412; *Fletcher v. Dyche*, 2 T. R. 32; *Legge v. Harlock*, 12 Q. B. 1015.
(*s*) *Westwood v. Secret. Ind.*, 11 W. R. 261; 7 L. T. R. N. s. 736; *Russell v. Sa Da Bandiera*, 13 C. B. N. s. 149; 32 L. J. C. P. 68.

(*t*) *Jones v. St. John's College*, L. R. 6 Q. B. 115.

(*u*) *Roberts v. Brett*, 6 C. B. N. s. 635; *Kingston v. Preston*, cited 2 Doug. 689.

(*x*) *Appleby v. Myers*, L. R. 2 C. P. 651; 36 L. J. C. P. 331.

specified is completed ; and if the house is destroyed by accident, the employer would be bound to pay the instalments then due, but would not be responsible for the intermediate work and labor and materials. (*y*)

In the Roman law, if a builder was employed to build a house on the land of the employer, and the building was overthrown by an earthquake, or destroyed by lightning, during the progress of the work, the employer was accountable both for the materials which the undertaker of the work had furnished and for what was due on account of the workmanship, inasmuch as the materials and the produce of the labor became the property of the employer as soon as they were fixed on the land ; but if, by an express contract between the parties, the payment of the money was made conditional on the completion and approval of the building, so that nothing was due until the whole of the work had been performed, then the builder lost both the value of his materials and of his workmanship, and was bound to reconstruct the building before he called upon the employer for payment. (*z*)

When the contract is entire and indivisible for the manufacture out of materials furnished by the employer of a particular chattel for a specific sum, to be paid on the completion and delivery of the chattel to the employer, and the chattel is destroyed by inevitable accident whilst it remains unfinished in the hands of the workman, the employer must stand to the loss of his materials, and the workman to the loss of the price and value of his labor. Thus, if a printer is employed to print a book at so much per sheet, the price and value of the printing to be paid for on the completion of the work, and before the whole impression has been worked off and made ready for delivery, an accidental fire breaks out upon the printer's premises and consumes the work, the employer must stand to the loss of his paper, and the printer to the loss of the price and value of his labor and skill. (*a*) But if the work has been completed, and the copies have been printed and made ready for

(*y*) *Menetone v. Athawes*, 3 Burr. 1592; *Tripp v. Armitage*, 4 M. & W. 699; *post*, p. * 929.

(*z*) Dig. lib. 19, tit. 3, lex 59; Dig. lib. 6, tit. 1, lex 39.

(*a*) *Gillett v. Mawman*, 1 Taunt. 140.

delivery, and placed at the disposal of the employer, they remain at his risk ; and if an accidental fire then * breaks [* 401] out and consumes them, he must stand to the loss, and pay the printer his hire. (b)

If a shipwright is employed to repair a ship, the accessorial materials supplied by him for the work become, as we have previously seen, the property of the employer, as soon as they are attached to the vessel under repair, upon the principle that *omne accessorium sequitur suum principale*; and if the completion of the work is not made, either by agreement or by custom, a condition precedent to the payment, and the ship is accidentally burnt, the loss of such materials, as well as of the value of the work and labor employed upon them, is the loss of the employer and not of the workman, and the employer, consequently, must pay the fair value of the labor and materials, although he can reap no benefit from what has been done. (c) But where a man contracts to expend materials and labor on buildings belonging to and in the occupation of the employer, to be paid for on completion of the whole, and before completion the buildings are destroyed by accidental fire, the contractor is excused from completing the work, but is not entitled to any compensation for the work already done, which has perished without any default of the employer. (d)

Where a contract for the building of a ship vests the general property in the ship in the employer as the materials are put together and fashioned, (e) and the ship is destroyed by fire, the loss of the materials and workmanship will fall on the employer ; but if the property in the thing destroyed remains with the workman, the loss will fall upon the latter.

Deviations from Building Contracts — Extras. — If work has been agreed to be done, and materials supplied, under a building contract for certain estimated prices, and there has subsequently been a deviation from the original plan by consent of the parties, the contract and estimate are not on that account excluded, but are to be the rule of payment, as far as the contract can be

(b) *Adlard v. Booth*, 7 C. & P. 108.

(c) *Menetone v. Athawes*, 3 Burr. 1592.

(d) *Appleby v. Myers*, L. R. 2 C. P. 651; 36 L. J. C. P. 331.

(e) *Clarke v. Spence*, *post*, p. * 930; *Wood v. Bell*, 25 L. J. Q. B. 153, 321.

traced to have been followed, and the excess only is to be paid for according to the usual rates of charging; but if the original plan has been so entirely abandoned that it is impossible to trace the contract, and to say to what part of it the work shall be applied, the workman may charge for the whole work by measure and value, as if no contract at all had ever been made. But there must be a total deviation, so that the terms of the original contract are not applicable to the new work. (*f*)

[*402] For all work done beyond the * contract, under subsequent or antecedent directions, the plaintiff may recover, just as if no special contract had ever been made. (*g*) But the mere fact of the defendant having assented to certain alterations is not sufficient to make him liable to pay for them as extras not covered by the contract, unless the alterations are of such a nature that he cannot fail to be aware that they must increase the expense, and cannot be done for the contract price. (*h*) If extras have been done by the plaintiff without any authority from the defendant, the latter is not bound to pay for them. (*i*) If they are to be done only on the direction in writing of the architect, a direction in writing must be obtained. (*k*) In cases of variation set up by way of defence, the courts look to the subsequent conduct of the parties, for this obvious reason, that, as the parties intend the contract to remain in force, so far as it is not varied, it is only by comparing the conduct of the parties subsequently to the making of the alleged variation with the terms originally agreed upon that the court can determine with certainty upon oral evidence that such variations were mutually intended to take effect.

Prevention of Performance of Building Contracts. — Where an agreement was entered into between the plaintiff and defendant that the plaintiff should pull down the walls of three houses and erect for the defendant, on the site thereof, a malt-house and other buildings, and the plaintiff was ready and

(*f*) *Pepper v. Burland*, Peake, 139; *Robson v. Godfrey*, Holt, N. P. C. 236; *Ellis v. Hamlen*, 3 Taunt. 52.

(*g*) *Thornton v. Place*, 1 Mood. & Rob. 219; *Fletcher v. Gillespie*, 3 Bing. 637.

(*h*) *Lovelock v. King*, 1 Mood. & Rob. 60.

(*i*) *Dobson v. Hudson*, 1 C. B. N. S. 659; 26 L. J. C. P. 153.

(*k*) *Myers v. Sarl*, 30 L. J. Q. B. 9; *Russell v. Sa Da Bandiera*, 13 C. B. N. S. 149; 32 L. J. C. P. 68.

offered to do the work, but the defendant prevented him, it was held that the plaintiff had done all that was necessary to be done to enable him to sue the defendant for a breach of contract. (*l*) The builder or workman is not in such a case entitled to recover the full stipulated remuneration as if the buildings had been actually erected. A fair deduction must be made from the contract price in respect of the value of materials which have never been supplied and wages which have never been paid; and the damages must be confined to the actual pecuniary loss sustained by the plaintiff. (*m*)

Of the Right of Lien of Workmen and Artificers.¹—Every workman to whom a chattel has been delivered by the owner to be mended, repaired, or altered for hire, and who has bestowed his labor upon it, has a lien upon the chattel for his hire. This right of lien is a mere right of retainer until the pecuniary* claim has been satisfied, and carries [* 403] with it no right of sale. (*n*) A workman who has detained a chattel in the exercise of a right of lien is not entitled, in the absence of any usage of trade, to charge warehouse rent or the expense of keeping the chattel. (*o*)

Wherever a workman has bestowed work and labor or skill in repairing or improving a chattel at the request, or by the employment, of the owner, he has a lien upon it for a fair and reasonable remuneration, or for the contract price, if a price has been fixed by agreement. (*p*) Thus the artificer to whom goods are

¹ Upon the mechanic's lien laws of New York and other States, see Houck on the Mechanic's Lien Law (1867); Nott on the Mechanic's Lien Laws of New York (1854); Phillips on Mechanic's Liens (1874); Kneeland on Mechanic's Liens (2d ed. 1882); Hoyt on Mechanic's Liens (1882). U. S. Dig. tit. *Mechanic's Lien*, U. S. Ann. Dig. 1870-1878, tit. *Mechanic's Lien*, ib. 1879, &c., tit. *Lien*, II. a.

On common law and equitable liens of artisans, see article on Mechanic's Lien on Personal Property by J. H. Vance, 21 Am. L. Reg. N. s. 151; ib. 209; Herries v. Norvell, 17 Am. L. Reg. N. s. 97, and note, ib. 101; McIntyre v. Carver, 2 Watts & S. 392, 37 Am. Dec. 519, and note by A. C. Freeman, ib. 522.

(*l*) Peters v. Opie, 1 Ventr. 177; 2 Saund. 350; Collins v. Price, 5 Bing. 132; Ferry v. Williams, 8 Taunt. 70; 1 Moore, 498.

(*m*) Masterton v. Mayor, &c., of Brooketyre, 7 Hill. N. Y. Rep. 61.

(*n*) Thames Iron Works, &c. v. Patent Derrick Co., 29 L. J. Ch. 714.

(*o*) *Somes v. Brit. Emp. &c.*, 30 L. J. Q. B. 229; 28 ib. 221; E. B. & E. 353; 8 H. L. Cas. 338.

(*p*) Chase v. Westmore, 5 M. & S. 183.

delivered to be worked up, the shipwright to whom a vessel has been delivered to be repaired, (*g*) the printer to whom paper has been delivered to be printed, (*r*) the miller who has ground corn or meal at his mill, (*s*) the horsebreaker or trainer by whose skill a horse is trained and rendered manageable, (*t*) the stallion-keeper who has received a mare to be covered by his stallion, have each a lien for their hire, or the customary charges for their services, unless there be some express or tacit understanding between the parties to the particular contract inconsistent with the exercise of such a right. But where no work is to be done upon the chattel to improve or increase its value, or to carry it from one place to another for hire, no lien attaches upon it. Thus if a power of attorney, or an authority to receive money, is intrusted to a bailee in order that he may exhibit it as a voucher, he has no lien upon the document for money due to him from the bailor. Where a mortgage deed was delivered to an auctioneer in order that he might obtain payment of the principal and interest due thereon, and the auctioneer made several applications for the money, it was held that he had no lien upon the deed for his charges. (*u*)

The lien of the manufacturer and workman extends only to the principal chattels placed in his hands to be worked up, and not to the accessorial materials which may have been furnished by the employer, and left upon the premises of the manufacturer or workman unused. Thus where oil, madder, dyewood, and fustic were furnished to scribblers and fullers by a person who sent them cloth to be scribbled and fulled and dyed upon their premises, it was held that the lien of the scribblers and [* 404] fullers was confined to * the cloth, and did not extend to the oil, &c., furnished by the employers, and left upon the premises after the scribbling and fulling had been completed. (*w*) And where a stereotype printer received stereotype plates from his employer to print from, it was held that his lien

(*g*) *Franklin v. Hosier*, 4 B. & Ald. 341; *Williams v. Allsup*, 10 C. B. N. s. 417; 30 Law J. C. P. 353. As to a maritime lien, see *The Two Ellens*, L. R. 3 Adm. & Eccl. 345; *ib.* 4 P. C. 161.

(*r*) *Blake v. Nicholson*, 3 M. & S. 167.

(*s*) *Chase v. Westmore*, 5 M. & S. 180.

(*t*) *Beavan v. Waters*, 3 C. & P. 520; *Jacobs v. Latour*, 2 M. & P. 201; 5 Bing. 130; *Scarfe v. Morgan*, 4 M. & W. 284.

(*u*) *Sanderson v. Bell*, 2 Cr. & M. 304.

(*v*) *Cumpston v. Heigh*, 2 Sc. 684.

for printing was confined to the paper, and did not extend to the plates from which he printed. But such a lien may be established by custom and the usage of trade, or by agreement of the parties. (*y*)

Liabilities of Task-workmen. — Every person who has entered into a contract for the performance of a particular task or job is bound to enter upon his employment without delay, to be active, industrious, careful, and diligent in the performance of the work ; to do it according to orders given and assented to ; (*z*) to complete it within a reasonable period, if no precise time has been agreed upon for its fulfilment ; and to exercise a reasonable amount of care and skill in its execution. If the work is to be performed under the direction of a surveyor to be appointed by the employer, the appointment of such surveyor is a condition precedent to the liability of the workman to commence his task ; and if the surveyor is not appointed within a reasonable period, the workman is released from his engagement to do the work. (*a*) In ordinary cases, the workman may accomplish the work through the medium of inferior agents and workmen ; but if the work is a work of art and genius, and the contract is founded upon the personal talent and capacity of the artist, he impliedly undertakes to perform the work himself, and may not intrust it to an inferior agent of less skill and reputation. (*b*)

Of the Implied Obligation to do the Work well — Skilled Workmen. — Every person who professes to be a skilled workman impliedly undertakes to do his work well and in a workmanlike manner, and according to the rules and principles of his trade or art. "When a person is employed in a work of skill, the employer buys both his labor and his judgment ; he ought not to undertake the work if he cannot succeed ; and he should know whether he will or not." (*c*) The public profession

(*y*) *Bleadon v. Hancock*, M. & M. 465.

(*z*) *Streeter v. Horlock*, 7 Moore, 287.

(*a*) *Coombe v. Greene*, 11 M. & W. 483.

(*b*) "Le principe, que le conducteur peut faire l'ouvrage par un autre, reçoit exception à l'égard des ouvrages de génie dans lesquels on considère le talent per-

sonnel de celui à qui on les donne à faire ; comme, lorsque j'ai fait marché avec un peintre pour peindre un plafond, il ne lui est pas permis de la faire faire par un autre sans mon consentement." — *Ротн. Louage*, No. 421 ; *Robson v. Drummond*, 2 B. & Ad. 308 ; *British Wagon Co. v. Lea*, 5 Q. B. D. 149.

(*c*) *Bayley, J., Duncan v. Blundell*,

of an art is a representation and undertaking to all who [*405] require and make use of the services of *the professed artisan, that the latter is possessed of, and will exercise, the ordinary amount of skill and knowledge incident to his particular craft, art, or profession. (*d*) If, therefore, an accountant is employed to make out an account, and he miscalculates the amounts, and carries wrong balances to the injury of the employer, he is responsible in damages to the latter. (*e*) If a carpenter undertakes to roof a barn, and employs defective materials, or does his work so negligently and unskilfully that the thatch sinks and lets in the wet, he is liable for the injury to the building so occasioned. (*f*) Where a carpenter undertook to build a booth on a race-course, and the booth fell down in the middle of the races from bad materials and bad workmanship, it was held that the carpenter was responsible for the damage that had been sustained. (*g*) The degree of skill and diligence which is required from the workman rises in proportion to the value, the delicacy, and the beauty of the work, and the fragility and brittleness of the materials. The Roman law required the exercise of greater skill and diligence from workmen who undertook the delicate work of raising or removing pillars of granite and porphyry, than from those who were employed upon common materials; and greater care from a person who undertook to remove a column, than from a man who was employed in the transport of a rude block of stone. (*h*) Clockmakers, jewellers, opticians, and all kinds of skilled workmen, and all persons belonging to the learned professions (except barristers), are responsible in damages if they profess to accomplish more than they are able to perform, and undertake works of skill without being possessed of sufficient skill, or apply less than the occasion requires. (*i*) "Every person," observes Tindal, C. J., "who enters into a learned pro-

3 Stark. 7, cited 5 M. & P. 548; "C'est de sa parte une faute de se charger d'une chose qui surpasse ses forces." — POTHIER, *Louage*, 404, No. 525.

(*d*) Harmer v. Cornelius, 5 C. B. N. S. 246; 28 L. J. C. P. 85.

(*e*) Story v. Richardson, 8 Sc. 291; 6 Bing. N. C. 123.

(*f*) Basten v. Butter, 7 East, 479;

Money Penny v. Hartland, 2 C. & P. 378; Pothier (*Louage*), No. 427; Tr. des Oblig. No. 163.

(*g*) Broom v. Davis, 7 East, 480, n. (*a*).

(*h*) Dig. lib. 19, tit. 2, lex 25, sect. 7.

(*i*) Seare v. Prentice, 8 East, 352; Slater v. Baker, 2 Wils. 359.

fession, undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause; nor does a surgeon impliedly undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill; but he undertakes to bring a fair and competent degree of skill." (*k*) So a chemist will be liable for negligence in compounding hair wash, by which the plaintiff's wife was injured; (*l*) and a patent * agent for negligence in not being aware of a [* 406] legal decision which made an important change in the practice of obtaining patents. (*m*)

Work rendered useless by the Negligence or Incompetence of the Workman.¹—Whenever the work contracted to be done is a work of art and skill, and the undertaker, being charged with the bare work, executes it so negligently and unskilfully as to render it utterly useless to the employer, he cannot call upon the latter for payment of it. Thus where a builder contracted with the defendant to rebuild the front of his house, and built it out of the perpendicular, so that it was in danger of falling, and required to be taken down, it was held that the builder could not maintain an action in respect of such defective execution of the work. "If there has been no beneficial service," observes Lord Ellenborough, "there shall be no pay." (*n*) And where a man undertook to erect a stove in a shop, and to lay a tube under the floor which would carry off the smoke, and the plan entirely failed and the stove could not be used, it was held that he was not entitled to an action in respect of his work and labor in the erection of the stove. (*o*) "If a man contracted with another to build him a house for a certain sum, it would surely not be sufficient for him to show that he had put together such a quantity of brick and timber; he ought to be prepared to show that he had done the stipulated work according to his

¹ Negligence of druggist, *Thomas v. Winchester*, 6 N. Y. 397; discharging artisan for unskilfulness, *Leatherberry v. Odell*, 7 Fed. Rep. 641.

(*k*) *Lamphier v. Phipos*, 8 C. & P. 479; *Hancke v. Hooper*, 7 C. & P. 81.

(*l*) *George v. Skivington*, L. R. 5 Exch. 1. This case is disapproved of in *Heaven v. Pender*, 9 Q. B. D. 302, as there was no contract with the wife.

(*m*) *Lee v. Walker*, L. R. 7 C. P. 121.

(*n*) *Farnsworth v. Garrard*, 1 Campb. 38; *Denew v. Daverell*, 3 Campb. 451.

(*o*) *Duncan v. Blundell*, 3 Stark. 6; *Hayselden v. Stuff*, 5 Ad. & E. 161.

contract." (*p*) When a building is so negligently constructed as to be dangerous and unfit for use, the employer may require the builder to take down the structure and rebuild it; and if the builder neglects so to do, and refuses to fulfil his part of the contract, the employer may give him notice to remove his materials from off the land, and may resist payment of any portion of the price of the work. If he retains the materials, and makes use of them, he will be bound to pay their fair value; but if the materials are altogether useless, or the employer has suffered from the breach of contract on the part of the workman more damage and injury than they are worth, he is not bound to pay anything. (*q*)

Useless and Unskilful Professional Services. — If a surgeon requires his patient to undergo an operation which turns out to have been altogether useless or unnecessary, he cannot make it the subject of a pecuniary claim or charge on such patient. If a medical man ignorantly and unskilfully administers improper medicines, and the patient, consequently, derives no [*407] benefit from * his attendance, the medical man is not entitled to any remuneration for what he has done; but if he has employed the ordinary amount of skill in his profession, and has applied remedies fitted to the complaint, and calculated to do good in general, he is entitled to his hire and reward, although they may have failed in the particular instance, such failure being then attributable to some peculiarity in the constitution of the patient for which the medical man is not responsible. (*r*) If a surveyor, engineer, or architect, from negligence or want of skill, gives his employers a grossly incorrect estimate of the cost of certain works, and thereby leads them into unnecessary expenses, he is not entitled to be paid for his plans, estimates, and specifications. (*s*) But if the incorrectness of the estimate arises from the inherent difficulties in the work itself, the employer will not be relieved from the obligation of payment. If a solicitor conducting a suit is guilty of misconduct and negligence, by reason whereof all the previous steps

(*p*) *Le Blanc, J., Basten v. Buttre*, 7 East, 484.

(*q*) *Tindal, C. J., Hill v. Featherstonehaugh*, 5 M. & P. 544, 548; *Farnsworth v. Gerrard*, 1 Campb. 38; *Pothier, Louage d'ouvrage*, No. 434.

(*r*) *Kannen v. McMullen, Peake*, 83; *Huie v. Phelps*, 2 Stark. 480.

(*s*) *Money Penny v. Hartland*, 2 C. & P. 378.

taken in the cause become useless, he cannot recover his charges for any part of the business he has done; but if the suit fails from causes over which the solicitor has no control, the case is otherwise. (t) If a solicitor issues a writ and proceeds thereon in a court of special and peculiar jurisdiction, he is bound to acquaint himself with the machinery and practice of the court, and to see that it is adequate for the purposes of the suit; and if the suit fails from the ignorance of the solicitor in this respect, he cannot recover his costs and charges of the abortive proceedings. (x) If a parliamentary agent employed to obtain an act of parliament draws the clauses of the bill himself, and frames them so negligently and carelessly that one of the main objects of the statute cannot be accomplished, the negligence may deprive him of all right to remuneration, or it may go merely in reduction of the value of his services. (y)

Actions against Solicitors for Negligence.¹—Every solicitor employed by a purchaser of freehold or leasehold property impliedly undertakes to exercise reasonable care and skill in the investigation of the title of the vendor. If his client has purchased leasehold property under conditions that he is to have no abstract of the vendor's title, and that the lessor's title is not to be objected to, or gone into, this will not exonerate the solicitor from the duty of investigating the vendor's title so far as to *ascertain that there is a [*408] lease to him creating the interest he professes to sell, and that it has been duly registered where registration is necessary. (z) But a solicitor is not liable to an action for negligence

¹ Shearman and Redfield on Negligence (3d ed. with Addenda, 1880); Wharton on Negligence (2d ed. 1878); U. S. Dig. tit. *Negligence*; Weeks on Attorneys and Counsellors (1878), c. 12; liability of attorneys, &c., to clients—negligence—and remedies of clients against attorneys, U. S. Dig. tit. *Attorney and Client*, II. 4; U. S. Ann. Dig. 1870–1878, tit. *Attorney and Client*, II.; ib. 1879, &c. tit. *Attorney and Client*, III. d.; McLelland on Civil Malpractice (1877); U. S. Dig. tit. *Physicians*; *Savings Bank v. Ward*, 100 U. S. 195.

(t) *Bracey v. Carter*, 12 Ad. & E. 373; *Long v. Orsi*, 13 C. B. 615; 26 L. J. C. P. 127; *Stokes v. Trumper*, 2 Kay & J. 232; *Chapman v. Van Toll*, 8 Ell. & Bl. 396; 27 L. J. Q. B. 1.

(x) *Cox v. Leech*, 1 C. B. N. s. 617; 26 L. J. C. P. 125.

(y) *Baker v. Milward*, 8 Ir. C. L. R. 514.

(z) *Allen v. Clark*, 11 W. R. 304. As to the receipt of money for investment by one of several solicitors in partnership, see *ante*, p. *365.

at the suit of one between whom and himself the relation of solicitor and client does not exist, for giving, in answer to a casual inquiry, erroneous information as to the contents of a deed. (*a*)

A solicitor is liable for the negligence of his agent, (*b*) partner, (*c*) or clerk. (*d*) The obligation of the solicitor is towards his client, and not towards a stranger. (*e*) Yet if he undertakes without authority to act for any person, he is liable for negligence. (*f*)

The solicitor, having accepted the retainer, is in general bound to prosecute the matter intrusted to him to its termination, but not if he cannot obtain his fees or security for them, and he gives reasonable notice of throwing up the retainer. (*g*)

The retainer is at an end when judgment is recovered, (*h*) but it may be renewed. (*i*)

A solicitor who has been retained to conduct an action, and who, after judgment in favor of his client, is authorized to do his best for the purpose of obtaining the fruits of the judgment, has control over the process of execution so far as such purpose is concerned, and may consent to the withdrawal of a *fi. fa.* (*k*)

He may also accept payment of the debt by instalments if it is for the client's advantage to do so, but he has no implied authority to enter into an agreement on his behalf to postpone execution. (*l*)

The solicitor is not liable upon points of new occurrence or

(*a*) *Fish v. Kelly*, 17 C. B. N. S. 194.

(*b*) *Simons v. Rose*, 31 Bea. 11.

(*c*) *Norton v. Cooper*, 3 Sm. & Giff. 375; *Dundonald v. Masterman*, L. R. 7 Eq. 504; 38 L. J. Ch. 350; *Bickford v. D'Arcy*, L. R. 1 Ex. 554; 35 L. J. Ex. 202.

(*d*) *Floyd v. Nangle*, 3 Atk. 568; *Prestwick v. Poley*, 18 C. B. N. S. 806; 34 L. J. C. P. 189.

(*e*) *Fish v. Kelly*, 17 C. B. N. S. 194.

(*f*) *Westaway v. Frost*, 17 L. J. Q. B. 286; see *Horace Smith on Negligence*, p. 128.

(*g*) *Wadsworth v. Marshall*, 2 Cr. & J. 665; *Hoby v. Built*, 3 B. & Ad. 350; *Van Sandau v. Browne*, 9 Bing. 402.

(*h*) *Flower v. Bolingbroke*, 1 Str. 639; *Brackenbury v. Pell*, 12 East, 588; *Macbeth v. Ellis*, 4 Bing. 578; see *Horace Smith on Negligence*, p. 129.

(*i*) *Butler v. Knight*, L. R. 2 Ex. 109; 36 L. J. Ex. 66.

(*k*) *Godefroy v. Dalton*, 6 Bing. 468; *Laidler v. Elliot*, 3 B. & C. 738.

(*l*) *Leby v. Abbott*, 4 Ex. 588; 19 L. J. Ex. 62.

of nice or doubtful construction, (*m*) but he must show himself acquainted with the ordinary practice of his profession. (*n*)

It is the duty of every attorney and solicitor to act with fidelity to his client, and to keep the secrets of the latter; for "if a man, being intrusted in his profession, deceive him who intrusted him, or if a man retained of counsel become afterward of counsel with the other party in the same cause, or discover the evidence or * secrets of the cause; or if an [*409] attorney act deceptive, to the prejudice of his client, or make default by collusion with others, whereby his client is injured, an action lies for damages." (*o*) If an attorney, when his client's deeds are put into his hands for the purpose of raising money, discloses defects of title to the person who was about to lend, and the client sustains damage therefrom, the attorney is responsible for neglect of duty, and cannot shelter himself from the consequences by showing that he was also employed on the part of the proposed lender, and was actuated by a sense of justice towards him; for whenever an attorney finds that he has a conflicting duty to discharge towards his several clients, he must at once withdraw from the inconsistent employment, and decline to act in the matter. Whenever the attorney has his client's title-deeds put into his hands for any purpose whatever, "he is to consider his lips sealed with a sacred silence as to the whole of their contents." (*p*)

It is also the duty of every attorney, by reason of the emolument he receives for the exercise of his professional skill, to take care that his client does not enter into any covenant or stipulation that may expose him to a larger responsibility than the nature of the business he is instructed to transact may, in the ordinary course of practice, require. If the stipulations are more

(*m*) *Lovegrove v. White*, L. R. 6 C. P. 440.

(*n*) *Hunter v. Caldwell*, 10 Q. B. 69, 83. All the cases of negligence are collected in the editor's book on Negligence.

(*o*) Com. Dig. *Action on the Case for Deceit*, A. 5. As to their duty to keep accounts, see *Ex parte Neville*, L. R. 4 Ch. App. 43. As to their duty to see that a charge on the property of a company is duly registered, as directed by

sect. 43 of the Companies Act, see *Ex parte Valpy and Chaplin*, L. R. 7 Ch. App. 289. No agreement between an attorney and his client as to the former's remuneration made in pursuance of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), will absolve such attorney from the consequences of his negligence; see sect. 7.

(*p*) *Tindal, C. J., Taylor v. Blacklow*, 3 B. N. C. 235.

onerous in their consequences than usual, the matter should be fully explained to the client, and the unusual extent of liability be made known to him. (*q*)

If an attorney conducting a suit neglects to comply with the practice or orders of the court, and neglects to take some necessary step in the cause, by means whereof all the previous proceedings become useless, he will be responsible in damages to his client. (*r*) And the same consequences follow if he brings an action for his client, within a limited jurisdiction, on a cause of action manifestly arising out of the jurisdiction, (*s*) or negligently suffers judgment to go by default when he is retained to defend an action; (*t*) or fails to instruct counsel properly, and to deliver briefs in sufficient time to enable his counsel effectively [*410] to perform the duty *intrusted to him; or if he is not present in person, or by his agent at the trial, to see that the witnesses are forthcoming when called upon. (*u*) When present at the trial, it is the duty of the attorney not to suffer the case to be called on, unless he has previously ascertained that all the necessary witnesses are in attendance; (*v*) but he is not bound to search after his counsel, nor is he answerable for the non-attendance or neglect of the latter. (*y*) If he has received instructions from his client not to compromise an action he is retained to prosecute, he will be guilty of a breach of duty if he does compromise, and cannot shelter himself from an action by showing that it was done under the advice of counsel, (*z*) although that circumstance might go in reduction of damages. But in the absence of a distinct prohibition to compromise, the general authority of an attorney is sufficient for that purpose. (*a*)

"It would be extremely difficult," observes Tindal, C. J., "to define the exact amount of skill and diligence which an attorney

(*q*) *Stannard v. Ullithorne*, 4 M. & Sc. 376; 10 Bing. 491.

(*r*) *Bracey v. Carter*, 12 Ad. & E. 373; *Frankland v. Cole*, 2 Cr. & J. 590; *Pitt v. Yalden*, 4 Burr. 2063.

(*s*) *Williams v. Gibbs*, 6 N. & M. 788.

(*t*) *Godefroy v. Jay*, 5 M. & P. 297; 7 Bing. 419.

(*u*) *Hawkins v. Harwood*, 4 Exch. 506; 19 Law J. Exch. 33; *De Rouffigny*

v. Peale, 3 Taunt. 483; *Swannell v. Ellis*, 8 Moore, 340; 1 Bing. 347.

(*v*) *Reece v. Rigby*, 4 B. & Ald. 202.

(*y*) *Lowry v. Guildford*, 5 C. & P. 234.

(*z*) *Fray v. Voules*, 1 El. & El. 839; 28 Law J. Q. B. 232; *Butler v. Knight*, L. R. 2 Exch. 109.

(*a*) *Pristwick v. Poley*, 34 L. J. C. P. 189; *Butler v. Knight*, *supra*.

undertakes to furnish in the conduct of a cause. The cases, however, appear to establish in general that he is liable for the consequences of ignorance or non-observance of the rules of practice of his court, (b) for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; but he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law, unless he has thought fit to act upon his own judgment and opinion respecting matters which ought to have been laid before counsel." (c) "I think it would be most unfair," said Alderson, B., "if an attorney were to be precluded from recovering his fair remuneration merely because he has made a mistake in an act of parliament." (d)

If an attorney is employed to investigate the title to an estate or to seek out an eligible investment, and obtain good security for money advanced, and the title is obviously defective, or the security is manifestly bad or insufficient, the attorney will be responsible * for his negligence both at common [*411] law and in equity. (e) But he is not responsible for an advance on a mortgage which turns out a deficient security, if he has taken the opinion of a competent surveyor as to the value of the property. (f) He is not justified in relying upon an extract from a will furnished to him by his client, unless the latter agrees to take the entire responsibility upon himself; but he ought to search for and examine the original will. (g) If he relies upon his own judgment and opinion as to the interpretation and legal operation of deeds and conveyances, he does so at

(b) *Lee v. Walker, post*, Contracts of Sale.

(c) *Godefroy v. Dalton*, 6 Bing. 468; *Purves v. Landell*, 12 Cl. & Fin. 98; *Shilcock v. Passman*, 7 C. & P. 292; *Kemp v. Burt*, 4 B. & Ad. 431; *Long v. Orsi*, 18 C. B. 610; *Cox v. Leech*, 1 C. B. N. s. 617; *Ireson v. Pearman*, 3 B. & C. 812, 813; *Townley v. Jones*, 8 C. B. N. s. 289.

(d) *Elkington v. Holland*, 9 M. & W. 661; *Laidler v. Elliot*, 3 B. & C. 738.

(e) *Knight v. Quarles*, 4 Moore, 532; 2 B. & B. 102; *Whitehead v. Greetham*, 10 Moore, 183; 2 Bing. 464; *Howell v. Young*, 5 B. & C. 259; *Chapman v. Chapman*, L. R. 9 Eq. Ca. 276.

(f) *Chapman v. Chapman, supra*. As to his duty to get the best price for the property intrusted to him for sale, see *Morgan v. Steble*, L. R. 7 Q. B. 611.

(g) *Wilson v. Tucker*, 3 Stark. 156.

his peril. If he draws a wrong conclusion from them he will be responsible in damages to his client. He ought, therefore, to lay them before counsel, if he wishes to avoid the responsibility of acting upon his own judgment respecting them. (*h*)

If when retained by a client who is about to advance his money on the security of a mortgage, he has reason to suspect that the intended mortgagor has been insolvent or in embarrassed circumstances, he will be responsible for a breach of duty if he neglects to make searches in the proper quarter to ascertain whether such intended mortgagor has ever taken the benefit of the Insolvent Act; (*i*) or to make inquiry whether there are any existing incumbrances on the property. (*k*)

By the Attorneys and Solicitors Act, 1870, (*l*) agreements may be made between solicitors and their clients with respect to the remuneration of the former; but, by sect. 7, a provision in any agreement that the solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such solicitor, is wholly void. By sect. 8, no action can be brought upon any such agreement, but the agreement may be enforced in the manner indicated in the section. It has been held that this section only applies to prevent actions to recover sums in lieu of costs after the work is done, and not to an action for refusing to allow a solicitor to do the work. (*m*) The above statute does not apply to conveyancing or non-contentious business, agreements as to which are regulated by the Solicitors' Remuneration Act, 1881. (*n*)

Negligence of Barristers.—There is no instance of any action having been successfully brought against a barrister [**412*] for neglect of **duty*; but if a barrister intentionally does a wrong, and acts with malice, fraud, or treachery in the discharge of his professional duties, he will be responsible, like every other wrong-doer, for the mischief thereby occasioned. (*o*)

(*h*) *Ireson v. Pearman*, 3 B. & C. 813;
5 D. & R. 699.

(*l*) 33 & 34 Vict. c. 28.

(*m*) *Rees v. Williams*, L. R. 10 Ex.

(*i*) *Cooper v. Stephenson*, 21 Law J. 200.
Q. B. 292.

(*n*) 44 & 45 Vict. c. 44, sects. 8, 9.

(*k*) *Hopgood v. Parkin*, L. R. 11 Eq.
Ca. 74; see *Ratcliffe v. Barnard*, L. R.
6 Ch. App. 652.

(*o*) *Swinfen v. Ld. Chelmsford*, 5 H.
& N. 918; 29 Law J. Exch. 382.

Negligence of Surveyors or Valuers. — Where the plaintiff undertakes to perform work to the satisfaction of the defendants' surveyor, payment to be made only on the certificate of such surveyor, if the defendants and the surveyor collude to withhold the giving of the certificate to prevent the plaintiff from being paid for his work, there is abundant authority, both at law and in equity, that the defendants cannot shelter themselves by means of any such misconduct. (*p*) But a declaration against the defendant, that his surveyor wrongfully and improperly neglected and refused to give his certificate, discloses no cause of action, for that would be to substitute the opinion of a jury for a certificate of the surveyor, which it was the very object of the contract to prevent. (*q*) Where two persons were employed to value between the incoming rector and the representatives of the deceased incumbent, and the defendant through ignorance of the true principle for the valuation of ecclesiastical dilapidations, valued so favorably to the opposite party and adversely to the plaintiff, that his valuation was accepted, it was held that he was liable for the results of his ignorance. (*r*)

Negligence of Bankers. — It has never been decided whether there is any legal obligation on a banker not to disclose the state of his customer's account except upon a reasonable and proper occasion; but assuming that such an obligation exists, the question, what is a reasonable occasion, is clearly one for the jury to decide, and if the customer sustain any special damage by the banker having disclosed the state of his account, the banker would, it seems, be responsible. (*s*) A banker is not liable for the loss of a box left under his care by a customer for safe custody, of which the customer keeps the key, and for which no payment is made, if it be stolen by one of the clerks of the bank, unless the loss was occasioned by gross negligence on the part of the banker. (*t*) But if a banker or banking company undertakes the custody of securities for a customer and charges a commission for the receipt of the dividends from them, they would, it seems, be liable for negligence, if they left the securities in the uncon-

(*p*) Erle, C. J., *Clarke v. Watson*, 34 L. J. C. P. 148.

(*s*) *Hardy v. Veasey*, L. R. 3 Exch. 107.

(*q*) *Clarke v. Watson*, *supra*.

(*t*) *Giblin v. McMullen*, *ante*, p.

(*r*) *Jenkins v. Betham*, 15 C. B. 168; * 356.

24 L. J. C. P. 94.

trolled power of their clerk or manager, who fraudulently disposed of them. (u)

[* 413] * If the customer of a banker, who is desired to keep his cheque-book locked up, nevertheless negligently leaves it on his table, and thereby enables his servant to get possession of it, and tear out a cheque and forge his master's signature to it, and commit a fraud upon the bankers, this will not enable the bankers to throw the loss upon their customer, as being the result of his negligent keeping of his cheque-book, for it could not reasonably have been anticipated that the power of obtaining a cheque would induce a servant to commit a forgery. (v)

Negligence of Public Officers. — Public officers in respect of their judicial or discretionary duties are not liable for negligence, but they are liable for negligence in respect of their ministerial duties. Where they perform duties for reward at the request of individuals, they are liable for negligence and are not protected, merely because they act *bona fide* and to the best of their skill and judgment, but they are bound to conduct themselves in a skilful manner. (y) Public officers who are servants of the government, are not responsible for the negligence of their subordinates; but public officers who act in a *quasi* public capacity at the request of individuals, are liable for the acts of those whom they employ. Thus Commissioners appointed by the Crown, are liable for the negligent acts of persons employed by them. (z)

Negligence of Surgeons, &c. — To render a medical man liable for negligence or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of care than even he himself might have bestowed; nor is it enough that he has himself

(u) *Rc United Service Co*, L. R. 6 Ch. App. 212. R. 9 Eq. Ca. 181; *Rc United Service Co.*, L. R. 6 Ch. App. 212.

(v) *Bank of Ireland v. Trustees of Evan's Charity*, 5 H. L. C. 411; *Swan* 133; *Jones v. Bird*, 5 B. & Ald. 837.

(z) *Mersey Docks v. Gibbs*, L. R. 1 H. L. 111. See also *Reg. v. Treasury*, L. R. 7 Q. B. 387.

ib. 714; see *Donaldson v. Gillott*, L. R. 3 Eq. Ca. 274; *Johnston v. Renton*, L.

acknowledged some degree of want of care ; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result. (*b*)

Where an action for negligence was brought against a surgeon, and it was proved that the plaintiff's mother sent for the defendant, * and that the plaintiff's father paid him, it [*414] was held that the plaintiff's submitting to the defendant's treatment is no sufficient proof that the defendant had been employed by the plaintiff. (*c*)

If I hire the labor and services and skill of a surgeon, an apothecary, a farrier, a solicitor, or any other professional person, he impliedly undertakes for the possession and exercise of ordinary skill and knowledge in the practice of his art or profession, and is responsible for any injury I may sustain from his neglect to exercise such skill. (*d*) In one case it was ruled by Cockburn, C. J., that surgeons who give their services gratuitously (as at hospitals) were not liable for the negligence of those employed under them ; (*e*) but it seems that a surgeon who acts gratuitously ought at least to take ordinary care. (*f*) Physicians could not at common law recover their fees, unless under a special contract, (*g*) but surgeons could ; (*h*) and now by 21 & 22 Vict. c. 90, sect. 31, physicians can recover their fees and need not show any special contract.

An unqualified person who acts as a doctor is equally bound to bring competent skill to the performance of the duty which he has undertaken. (*hh*)

Wilful Selection of Unqualified Persons.—The employer himself is bound to exercise ordinary caution and discrimination in the choice and selection of the party he employs. If he selects a common quack or an unauthorized practitioner, the latter is

(*b*) *Rich v. Pierpont*, 3 F. & F. 35.
See the cases in the present editor's book
on the Law of Negligence, p. 125.

(*c*) *Gladwell v. Steggall*, 8 Sc. 67; 5
C. B. N. S. 733.

(*d*) *Seare v. Prentice*, 8 East, 352;
Slater v. Baker, 2 Wils. 359; *Hancke v.*
Hooper, 7 C. & P. 84; *Lanphier v.*
Phippos, 8 C. & P. 479.

(*e*) *Perionowski v. Freeman*, 4 F. &
F. 982.

(*f*) *Horace Smith on Negligence*,
p. 125.

(*g*) *Chorley v. Bolcot*, 4 T. R.

(*h*) *Battersby v. Lawrence*, C. & M.
277.

(*hh*) *Ruddock v. Lowe*, 4 F. & F.
519.

responsible only for a reasonable and *bona fide* exertion of his capacity. He is bound to exercise such skill as he actually possesses; and if he has done his best and failed, he cannot be made responsible for a want of skill; for it was the employer's own fault to trust an unlearned and unskilful person, known not to be regularly and properly qualified. If the employer "voluntarily employs in one art a man who openly exercises another, his folly," observes Sir William Jones, "has no claim to indulgence; and unless the latter makes false pretensions or a special undertaking, no more can be fairly demanded of him than the best of his ability. The case which Sadi relates with elegance and humor in his Gulistan, or Rose Garden, is not inapplicable to the present subject. 'A man who had a disorder in his eyes called on a farrier for a remedy; and he applied to [*415] them a medicine *commonly used for his patients. The man lost his sight, and brought an action for the damages;' but the judge said, 'No action lies; for, if the complainant had not himself been an ass, he would never have employed a *farrier*.' And Sadi proceeds to intimate that, 'if a person will employ a common mat-weaver to weave or embroider a fine carpet, he must impute the bad workmanship to his own folly.'" (i)

Arbitrators. — A person who is appointed, and is acting as an arbitrator to determine a matter in difference between two or more persons does not enter into an implied promise to bring to the performance of the duty intrusted to him a due and reasonable amount of skill, or knowledge, or care, but only to act honestly and *bona fide*; and this doctrine applies, not only to an arbitrator properly so called, but to every person who has taken upon himself to determine a disputed matter between two persons who have agreed to be concluded by his opinion. (k) And although where the matter to be determined by the referee is one of value only, that is not strictly an arbitration, (l) yet where in ascer-

(i) Bailments, citing Rosar. Polit. 1; Stevenson v. Watson, 4 C. P. D. c. 7. 148.

(k) Pappa v. Rose, L. R. 7 C. P. 32, 525; 41 L. J. C. P. 187; Tharsis Sulphur Co. v. Loftus, L. R. 8 C. P. 184; Bos v. Hetham, L. R. 2 Ex. 72.

taining the value of property or the amount of compensation to be paid, the matter assumes the character of a judicial inquiry, to be conducted upon the ordinary principles of judicial inquiries, by hearing the parties and the evidence of their witnesses, that is an arbitration, and not merely a valuation. (*m*) Where two valuers are appointed to ascertain the price to be paid for the good-will, stock, and fixtures of a business, with a reference to decision of an umpire, if they differ, there is no arbitration until the umpirage takes effect. (*n*)

Bailment of Materials to Workmen to be manufactured or repaired for Hire. — When chattels or materials for work have been bailed or delivered to a workman to be repaired, made up, or dealt with by him in the way of his trade, he is bound to take all reasonable and ordinary forethought and precaution for their protection and preservation; and if a loss has occurred from robbery, or from fire or inundation, or from waste or decay, he must show that he had taken all such precautions as are ordinarily taken by prudent men to guard against the mischief. If clothes are delivered to a fuller to be dressed, and he suffers them to be eaten by mice, he will be responsible for the damage, unless he can discharge himself from all imputation of neglect, by showing that he had been subjected to some unusual and unexpected visitation * from such vermin. The [*416] very occurrence of the disaster affords a strong *prima facie* presumption of a want of ordinary caution. (*o*) Where a ship, bailed to a shipwright to be repaired, was put into a dry dock belonging to the shipwright, and whilst she lay there a high tide arose, and pressed against the dock gates; and it appeared that the gates might have been shored up so as to resist the pressure of the water, but nothing was done, and the water at last burst open the gates and dashed the bailor's vessel against another vessel, it was held that the bailee was responsible for the injury, as he might, by proper precautions, have

(*m*) *Re Hopper*, L. R. 2 Q. B. 372.

(*n*) *Turner v. Goulden*, L. R. 9 C. P. 75.

(*o*) In the Roman law, proof of such a disaster was held to be proof of negli-

gence. "Si fullo vestimenta polienda acceperit, eaque mures roserint, ex locato tenetur, quia debuit ab hac re cavere." — *Dig. lib. 19, tit. 2, lex 13, sect. 5.*

guarded against the accident. (*p*) Wherever the loss of the thing bailed arises from the want of the degree of care which, from the nature of the bailment, ought to be exercised, it is immaterial whether the negligence be imputable personally to the bailee or to the servants employed by him. (*q*)

Negligent keeping of Goods by Warehousemen and Depositories for Hire.¹—All persons to whom goods and chattels are

¹ For a general view of the law in the United States as to warehousemen, consult Ang. Carr. sects. 66, 75, 301-305; Edwards, Bailments, sects. 332-354; Schouler, Bailments, Part IV., c. 2; Story, Bailments, sects. 444-450, 502, 535; U. S. Dig. tit. *Warehousemen*.

A warehouseman is not a guarantor of the title of property placed in his custody, although his receipts therefor are by statute negotiable. *Insurance Co. v. Kiger*, 103 U. S. 352.

Where the holder of an invalid warehouse receipt for grain demands possession of the grain and receives the keys of the warehouse, he acquires no lien paramount to any right of a prior purchaser who holds a valid receipt, though without recorded evidence of his purchase. *Sexton v. Graham*, 53 Iowa, 181.

Though in an action against a warehouseman proof of a demand and refusal to deliver the goods is *prima facie* evidence of negligence, yet, in the absence of any showing of bad faith, if the goods appear to have been lost by a burglary, the burden remains on the plaintiff to show that the loss arose from defendant's negligence. *Clafin v. Meyer*, 75 N. Y. 260. See also on the burden of proof as to negligence, *Madan v. Covert*, 45 N. Y. Superior Ct. 245; *Collins v. Bennett*, 46 N. Y. 490; *Merchants', &c. Transp. Co. v. Story*, 50 Md. 4; *Boies v. Hartford, &c. R. R. Co.*, 37 Conn. 272; *Brandon v. Gulf City Cotton Press, &c. Co.*, 51 Tex. 121; *Thomas v. Darden*, 22 La. Ann. 413; *Schwartz v. Baer*, 21 La. Ann. 601; *Gay v. Bates*, 99 Mass. 263; *Barron v. Eldredge*, 100 Mass. 455. Proof of demand and refusal to deliver the goods casts upon the warehouseman the burden of excusing the non-delivery. *Golden v. Romer*, 20 Hun, 438. Compare *Leonard v. Dunton*, 51 Ill. 482, and *Ives v. Hartley*, ib. 520; *Sessions v. Western R. R. Corp.*, 16 Gray, 132. Where the owner of property stored in a warehouse intrusts a broker with a delivery order to enable him to ship the goods to a pretended buyer, and the broker removes the goods, stores them elsewhere in his own name, and sells them to an innocent purchaser for value, the latter acquires no title against the true owner. *Collins v. Ralli*, 20 Hun, 246. The fact that an adverse claim is made to the property does not entitle a warehouseman to require a bond of indemnity from the true owner as a condition of delivering the property; the remedy is by an interpleader. *Danfield v. Haeger*, 7 Abb. N. C. 318; s. c. 45 N. Y. Superior Ct. 428.

But one who claims as assignee of the original owner without producing the receipt may rightly be required to account for its loss and to give good security to the warehouseman. *Patten v. Baggs*, 43 Ga. 167. Warehouse receipts made payable to bearer are not negotiable; they are made negotiable only by written

(*p*) *Leck v. Maestaer*, 1 Campb. 137. *Richardson*, 3 Ell. & Bl. 169; 23 Law J.
 (*q*) *Ld. Campbell, C. J., Dausey v. Q. B.* 228.

delivered to be kept for hire and reward, and who are paid expressly and specifically for the exercise of their labor and care in keeping them, and not merely for the finding of a place of deposit, are bound to exercise that amount of care and vigilance for their preservation which the most prudent and careful of men exercise for the protection of their own property. (r) If the

indorsement and delivery. *Erie, &c. Despatch v. St. Louis, &c. Compress Co.*, 6 Mo. App. 172. See also *Harris v. Bradley*, 2 Dill. 284; *Hale v. Milwaukee Dock Co.*, 29 Wis. 482; *Shepardson v. Cary*, ib. 34. If the property forms part of a larger mass, it must be so designated as to distinguish it from the remainder in order to pass the title. *Ferguson v. Northern Bank*, 14 Bush, 555. See also *Cochran v. Ripy*, 13 Bush, 495; *Central Sav. Bank v. Garrison*, 2 Mo. App. 58; *Marks v. Cass County Mill, &c. Co.*, 43 Iowa, 146. The words at the end of a warehouse receipt, "subject to their order for all advances of money on the same," do not convert the receipt into a mere pledge so as to render the grain liable to an execution against the party giving it, issued after the date of the receipt. *Cool v. Phillips*, 66 Ill. 216.

As to the warehouseman's liability for the care of the goods and premises, see, further, *Smith v. Frost*, 51 Ga. 336; *Howell v. Morlan*, 78 Ill. 162; *Buckingham v. Fisher*, 70 Ill. 121; *Cole v. Favorite*, 69 Ill. 457; *State v. Stevenson*, 52 Iowa, 701; *Hamilton v. Elstner*, 24 La. Ann. 455; *Robinson v. Larrabee*, 63 Me. 116; *Aldrich v. Boston, &c. R. R. Co.*, 100 Mass. 31; *Schwerin v. McKie*, 51 N. Y. 180; *Moulton v. Phillips*, 10 R. I. 218; *Vincent v. Rather*, 31 Tex. 77. To save the goods from loss by fire he may be in duty bound to violate statutory requirements. *Macklin v. Frazier*, 9 Bush, 3. On the liability for losses by fire, see also *Irons v. Kentner*, 51 Iowa, 88; *Hough v. People's Fire Ins. Co.*, 36 Md. 398; *Coleman v. Livingston*, 45 How. Pr. 483; general duty of warehouseman to consult interest of owner of goods in forwarding them, and bribery of warehouseman by carrier, *Northrup v. Phillips*, 99 Ill. 449.

As to the warehouseman's compensation, see *Lehman v. Skelton*, 46 Ala. 310; *Hazeltine v. Weld*, 73 N. Y. 156; *Rea v. Trotter*, 26 Gratt. 585.

As to delivery, see *Matter of Clifford*, 2 Sawyer, 428; *The R. G. Winslow*, 4 Biss. 13; *Hills v. Snell*, 104 Mass. 173; *Parker v. Lombard*, 100 Mass. 405; *Colins v. Burns*, 63 N. Y. 1; *Coleman v. Livingston*, 36 N. Y. Superior Ct. 32; *Compton v. Shaw*, 3 Thomp. & C. 761.

As to warehouse receipts, their construction and negotiability, and the rights of the holders thereof, see, further, *Dows v. Ekstrone*, 1 McCrary, 434; *McNeil v. Hill*, Woolw. 96; *Nelson v. Brown*, 53 Iowa, 555; *German Nat. Bank v. Meadowcroft*, 4 Ill. App. 630; *Mathé v. N. O. Sugar-Shed Co.*, 32 La. Ann. 631; *Greenbaum v. Megibben*, 10 Bush, 419, and compare *Newcomb v. Cabell*, ib. 460; *Robson v. Swart*, 14 Minn. 371; *Hazard v. Abel*, 15 Abb. Pr. n. s. 413; *Wilson v. O'Day*, 5 Daly, 354; *Willner v. Morrell*, 40 N. Y. Superior Ct. 222; *Yenni v. McNamee*, 45 N. Y. 614; *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419; *Hale v. Milwaukee Dock Co.*, 23 Wis. 276; *Price v. Wisconsin Marine, &c. Ins. Co.*, 43 Wis. 267.

(r) "Quod si horrearius nominatim custodiam mercium in se recepit, videbitur locasse operas non solum exactæ, sed etiam exactissimæ custodiæ. — *Pandect. Just. ed. Poth. lib. 19, tit. 2, art. 3, 72.*

goods are injured by mice or rats, the warehouseman will be responsible for the damage, (s) although he keeps cats to destroy vermin. (t) It is no answer to an action against a warehouseman for the non-delivery of a chattel intrusted to him to keep for hire, to say that he has lost it; (u) the mere fact of the loss is *prima facie* proof of negligence, and he must rebut this presumption by showing that he had taken the greatest care of the thing intrusted to him, and had no means of preventing the loss. A booking-office keeper who receives money for booking parcels, is bound to put them into a safe place, and if he leaves them in a public room, or an open shop, and they are lost or stolen, he will be responsible to the owner. (x)

[* 417] * **Loss of Chattels by Wharfingers.**¹ — The duties and responsibilities of the wharfinger, in respect of the safe keeping of the goods intrusted to him, to be dealt with in the way of his trade, are analogous to those of the warehouseman. If he receives directions to shift them on board a particular vessel, he

¹ The rights and liabilities of a wharfinger are in general very similar to those of a warehouseman. See Edwards, Bailments, sects. 356-368; Schouler, Bailments, Part IV. c. 2, p. 99; Story, Bailments, sects. 451-454, 503; U. S. Dig. tit. *Wharves*, sect. 52.

As to what constitutes a wharfinger, see *Rodgers v. Stophel*, 32 Pa. St. 111.

A wharfinger is liable for disobeying instructions as to the parties to whom the goods are to be shipped. *Howell v. Morlan*, 78 Ill. 162.

If he at first refuses, but afterward consents, to deliver goods in his possession to the lawful owner, he is not liable for their destruction while in his possession by a fire occurring without his fault after the owner has had a reasonable time to remove them. *Carnes v. Nichols*, 10 Gray, 369.

A mere delivery of goods at the wharf is not enough to charge the wharfinger with the custody, but there must be on his part an express or implied consent to receive them. *Grosvenor v. New York Central R. R. Co.*, 39 N. Y. 34; *Packard v. Getman*, 6 Cow. 757; *Ætna Ins. Co. v. Wheeler*, 5 Lans. 480.

As to the termination of the bailment, see *Gass v. New York, &c. R. R. Co.*, 99 Mass. 227; *Merritt v. Old Colony, &c. Ry. Co.*, 11 Allen, 83; *Western Transp. Co. v. Barber*, 56 N. Y. 544; *Burton v. Wilkinson*, 18 Vt. 186; and see, further, the *Francesca T.*, 9 Ben. 34 and *Nelson v. Phoenix Chemical Works*, 7 Ben. 37.

Among recent decisions upon wharves and wharfage generally may be mentioned the following: *Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v.*

(s) *White v. Humphrey*, 11 Q. B. 44. man v. Boycot, 2 B. & S. 1; 31 Law J.

(t) *Laveroni v. Drury*, 8 Exch. 166; Q. B. 69.

see *Kay v. Wheeler*, L. R. 2 C. P. 302. (x) *Dover v. Mills*, 5 C. & P. 175.

(u) *Cairns v. Robins*, 8 M. & W. 258. As to passengers' luggage deposited in

Reeve v. Palmer, 5 C. B. N. s. 84; *Good-* railway-cloak rooms, see *ante*, p. *357.

does not discharge his duty by delivering them to one of the crew, but he is bound to place them in the hands of the captain, or some person in authority on board the vessel. (y) If he is clothed merely with the custody of the goods, and the duty of shipping them devolves, by usage and custom, upon the master of the vessel to which they are to be sent, the wharfinger is discharged from responsibility as soon as he has placed them at the disposal and under the care of the master and officers of such vessel, although they are not actually removed from the wharf. (z)

Loss of Cattle—Liabilities of Agisters of Cattle.¹—A person who receives cattle or horses, or living animals to keep for the owner, and is paid expressly for his care and watchfulness in preserving them, as well as for their sustenance, is bound to take the utmost care of them, and he is responsible for damage and injury resulting from ordinary casualties if such damage might have been averted and prevented by the exercise of great care

Tobin, ib. 430; Guy v. Baltimore, ib. 434; The J. H. Starin, 15 Blatchf. 473; The John M. Welch, 9 Ben. 507; Soule v. San Francisco Co., 54 Cal. 241; Chicago, &c. R. R. Co. v. Maher, 91 Ill. 312; St. Martinsville v. The Mary Lewis, 32 La. Ann. 1293; New Orleans v. Wilmot, 31 La. Ann. 65; Nickerson v. Tirrell, 127 Mass. 236; Breed v. Lynn, 126 Mass. 367; Walsh v. New York, &c. Dock Co., 77 N. Y. 448; Simpson v. Neill, 89 Pa. St. 183.

¹ Agisters, like other bailees for hire, are bound to exercise only ordinary care and diligence. Umlauf v. Baassett, 38 Ill. 96; Halty v. Markel, 44 Ill. 225; Maynard v. Buck, 100 Mass. 40; McCarthy v. Wolfe, 40 Mo. 520; Rey v. Toney, 24 Mo. 600; Waldo v. Beckwith, 1 New Mex. 97; Eastman v. Patterson, 38 Vt. 146.

But in the absence of special agreement or statutory enactment, the agister has no lien upon the animal delivered to him for keeping. McDonald v. Bennett, 45 Iowa, 456; Allen v. Ham, 63 Me. 532; Goodrich v. Willard, 7 Gray, 183; Mauney v. Ingram, 78 N. C. 96; see, also, Whitlock v. Heard, 13 Ala. 776; Leavy v. Kinsella, 39 Conn. 50; McCoy v. Hock, 37 Iowa, 436; Grinnell v. Cook, 3 Hill (N. Y.), 485; Edwards, Bailments, sect. 331; Story, Bailments, sect. 443.

Nor has an ordinary livery-stable keeper any lien, except by statute. Miller v. Marston, 35 Me. 153; Hickman v. Thomas, 16 Ala. 666, and the authorities just cited.

Relinquishing possession is generally a waiver of any lien given by statute. Estey v. Cooke, 12 Nev. 276. Upon the old Spanish law of pastures, consult Waldo v. Beckwith, 1 New Mex. 97.

(y) Leigh v. Smith, 1 C. & P. 638, Story on Bailments, 293; Jones on Bailments, 97.

(z) Cobban v. Downe, 5 Esp. 41;

and vigilance. Very slight evidence of neglect has been sufficient to induce juries to return verdicts in favor of those who have sought compensation for the loss of cattle delivered to bailees to be kept for reward. Thus where the defendant, a farmer, had received the plaintiff's horse to agist for a certain price, and the horse strayed and was lost, and never after heard of, and the plaintiff gave evidence of the gates having been occasionally seen left open, and the fences being in parts out of order, but it did not appear directly that the horse had strayed through any defect in the fences, or through any of the gates being left open, the jury, nevertheless, returned a verdict against the defendant for the full value of the horse. (*a*) If the bailee suffers his fences to be defective, or puts the horse into a dangerous pasture, and the animal by reason thereof is lost or injured, this is a degree of neglect for which he is undoubtedly responsible. (*b*) Where an agister placed the plaintiff's horse in a field where there were heifers, knowing that a bull was in the habit of getting into the field, though he did not know it was vicious, and the bull gored the horse, it was held that the *scienter* was immaterial, as he had contracted to take reasonable care, and had not done so. (*c*)

[*418] * **Theft by Servants.** — If the subject-matter of the bailment is secretly purloined by the bailee's servant, the bailee will be responsible for the loss, unless he can show that he could not, by the exercise of the greatest vigilance, have guarded against the theft; but he will not be responsible for a robbery by irresistible violence. (*d*) Where a chronometer, bailed to a watchmaker to be repaired for hire, was placed by the bailee in a drawer in his shop amongst a variety of common watches, part of which belonged to the bailee, and the rest to his customers, which drawer was locked at night, and in a recess in the same room stood a strong iron chest, in which watches belonging to the watchmaker, of the value of several thousand pounds, were deposited and locked up, and in the night the drawer was broken open by the watchmaker's servant, who slept in the shop, and the chronometer was stolen by him together with the other

(*a*) *Broadwater v. Blot*, Holt, 547.

(*c*) *Smith v. Cook*, L. R. 1 Q. B. D.

(*b*) *Mosley v. Fosset*, 1 Roll. Abr. 4. 79.

See Add. on Torts (5th ed. by Cave), p. 358.

(*d*) *Walker v. British Guarantee Ass.*, 21 Law J. Q. B. 260; 18 Q. B. 277.

watches there deposited, but the watches in the iron chest remained untouched, it was held, that as the watchmaker had taken more care of his own watches, by locking them up in the iron safe, than he had taken of the bailor's chronometer, he was responsible for the loss, and Dallas, C. J., was of opinion that the watchmaker "was bound to protect the property against depredation from those who were within the house." (e)

Distinction between Robbery and Theft. — A very sensible distinction is taken in the civil law between a public palpable robbery by force and violence, when a house is broken into and robbed of its contents, and a theft or secret purloining of goods. In the one case, the bailee relieved himself from responsibility for the loss by proof of the mere fact of the robbery, (f) it being considered that individual care or vigilance could avail but little against the open attack of the determined robber; in the other, he was bound to make good the loss, unless he could show that he had taken the greatest care of the thing intrusted to him, and that it had been purloined, notwithstanding every precaution for its safety. (g) Where an officer in the army, on leaving London, delivered a trunk containing divers articles of value to an upholsterer to be kept for a shilling a week, and the trunk was returned to the officer emptied of its contents, which were supposed to have been stolen by the upholsterer's servant, it was held by Lord Kenyon that if the upholsterer had taken as much care of * the articles as he had taken of his [* 419] own property, he was not responsible for the theft committed by his servant; (h) but every depositary of chattels to be kept for hire is *prima facie* responsible for a theft committed by his own servants within the house, (i) and can only discharge himself from liability by showing that the theft was committed

(e) Clarke v. Earnshaw, Gow, 30.

(f) Dig. lib. 17, tit. 2, lex 52, 53; Inst. lib. 3, tit. 15, sects. 2, 3.

(g) "Ad casus autem fortuitos non sunt referendi illi casus, qui cum culpa conjuncti esse solent; cujusmodi sunt *furtiva*. Quamobrem, qui rem *furto* amisam dicit, *is diligentiam suam probare debet*." — *Vin. Com. ad Inst. lib. 3, tit. 15, sect. 5*; Pothier (Pret à Usage), art.

53; Abbott, C. J., in Robinson v. Ward, Ry. & M. 276.

(h) Finucane v. Small, 1 Esp. 315.

(i) Hodgson v. Fullarton, 4 Taunt. 787; Dallas, C. J., in Clarke v. Earnshaw, Gow, 32; Campbell, C. J., and Coleridge, J., in Dansey v. Richardson, 3 Ell. & Bl. 156-171; 23 Law J. Q. B. 223-229; De Rothschild v. Royal Mail, &c. Co., 7 Exch. 734; 21 Law J. Exch. 273.

under such circumstances, or was of such a nature, that the greatest care and vigilance on his part could not have guarded against it or prevented it.

Losses occasioned by the Negligence of the Bailor.— If the owner himself in any way conduces to the loss; if he brings people to the warehouse or place of deposit to look at the goods, opens packages in which they are contained, &c., and the loss is as likely to have arisen from the misconduct of the persons so introduced, or from the carelessness of the owner, as from the neglect of the warehouseman or bailee, the latter is not responsible for the loss. Thus where a quantity of ginseng contained in a box was deposited by the plaintiff in the defendant's warehouse, and the plaintiff was in the habit of resorting to the box, and ordering the lid to be taken off for the purpose of showing the ginseng to expected purchasers who came to the warehouse to view it on the invitation of the plaintiff, and rats at last got into the box and destroyed the ginseng, it was held that the defendant, the warehouseman, was not responsible for the loss. (*k*)

Negligence of Bailors.— It is the duty of every bailor of dangerous, explosive, and combustible substances, knowing the dangerous nature of them, to take care that the danger is communicated to a bailee to whom they are delivered to carry, to take care of, or to keep; and if the bailor fails to make the necessary disclosure, he is responsible if an accident occurs, and damages are sustained by the bailee or his servant. (*l*)

Fraudulent Concealment of the Dangerous Nature of Articles delivered to a Bailee to be warehoused or carried.¹— Every

¹ The transportation of explosives by railroads is subject to some peculiarities, owing to the number and variety of explosive compounds which have been brought into use during recent years; also, in the United States, to the peculiar distribution of powers between the Federal and State governments. The increased care and skill required from the carrier, and the great risk involved in the service, are recognized reasons entitling him to make an extra charge; but, to avoid this, shippers are prone to pack explosives without disclosing their dangerous character, and both from wilful concealment and from ignorance of the dangerous character of a new article, the carrier is liable to incur an explosion. See a case which arose when dynamite was first introduced (*Boston, &c. R. R. Co. v. Carney*, 107 Mass. 568),

(*k*) *Cailiff v. Danvers*, 1 Peake, N. P. C. 155; Add. on Torts (5th ed. by Cave), pp. 23–26. (*l*) *Farrant v. Barnes*, 32 L. J. C. P. 137.

person who conceals in boxes and packages articles known by him to be of an explosive, corrosive, or combustible and dangerous nature, and delivers them to another to be warehoused or carried with other goods by land or by sea, and fails to disclose the dangerous nature of the articles to the bailee, is guilty of a tortious act, and is responsible for all the consequences of his carelessness, unless the bailee knew of the dangerous nature of the articles, and the * danger and risk attendant upon [* 420] the receiving and dealing with them. And it is no answer to aver that the articles were well known in trade and commerce, and that the plaintiff knew what they were, without an express averment that he knew them to be dangerous. (m)

"It is clearly a tortious act," observes Crompton, J., "for the consequences of which shippers are responsible, to ship goods apparently safe and fit to be carried, and from which the ship-owner is ignorant that any danger is likely to arise, without notice of such goods being dangerous, if the shipper is aware of such danger. Such shipment when the *scienter* is made out is clearly wrongful and tortious; but it does not seem that there is any authority decisive on the point as to whether the shipper

in which a quantity of that compound from one factory, and a parcel of "exploders," such as are used in firing dualin, came, by an unfortunate coincidence, to the same depot of the Boston & Albany Railroad, at the same time, to be transported. Each package was properly labelled; but as the workmen had never heard of dualin, and knew nothing of the office of the exploders, they put them side by side in the same freight-car, and some concussion on the trip caused a disastrous explosion. See an instance also (Nitro-Glycerine Case, 15 Wall. 524, and *Barney v. Burstenbinder*, 7 Lans. 210) in which nitro-glycerine oozing from the cracks of a leaky box was mistaken by the workmen in an express company's office for salad oil, and they began opening the box with a mallet and chisel, causing a fatal explosion. These cases recognize it to be the duty of a shipper of dangerous articles, especially those of novel character, to take precautions commensurate with the danger, for informing the carrier of the special responsibility he incurs.

The subject has been partly regulated by national laws, and part has been left to State legislation. Before the days of railroads, it had come to be understood that Congress controlled carriage of dangerous articles by water; but the early laws on the subject mentioned only gunpowder and the few articles of dangerous character then in use. In 1866 transportation of nitro-glycerine and its compounds was restricted by act of Congress (see Rev. Stat. sects. 4278, 4279; also sects. 5353, 5354). But the provisions do not embrace gunpowder; apparently this is controlled only by State laws or the regulations of the various carriers. It is also to be remembered that each State regulates any transportation commencing and ending within its limits.

(m) *Hutchinson v. Guion*, 5 C. B. N. s. 149; 28 Law J. C. P. 63.

is liable for shipping dangerous goods without a communication of their nature, when neither he nor the shipowner is aware of the danger. It seems very difficult to hold that the shipper can be liable for not communicating what he does not know. Lord Ellenborough's dictum (*n*) would tend to show that knowledge of the party shipping is an essential ingredient. I entertain great doubt whether either the duty or the warranty extends beyond the cases where the shipper has knowledge, or the means of knowledge, of the dangerous nature of the goods when shipped, or where he has been guilty of some negligence as shipper, as by shipping without communicating danger which he had the means of knowing, and ought to have communicated." (*o*)

Deposit of Goods under a Special Contract. — In a contract of bailment, the bailee may impose any fair and reasonable terms he pleases upon the bailor, and may make his acceptance of the goods to be kept, and his responsibility for the re-delivery of them dependent upon those terms being assented to and observed by the parties who deal with him; but if he accepts the goods and takes them into his possession, he will not be allowed to impose terms utterly repugnant to, and inconsistent with, any contract at all. Where public notice is given of the terms upon which goods are received, or the terms are printed on a paper or receipt delivered to the bailor, and it is sought to hold him to the terms on the ground that he has impliedly assented to them, it should be shown that the terms are reasonable and fair, and not devised for the purpose of fraud or extortion, or for the purpose of exonerating the bailee from responsibility for his own negligence and misconduct (*p*)

[*421] ***Detention of Chattels by Bailees under a Claim of Lien.** — The detention of chattels by a bailee is frequently justified on the ground that the bailee has a right to hold them in his hands until some pecuniary demand upon or in respect of them has been satisfied by the bailor.

(*n*) *Williams v. East Ind. Co.*, 3 East, 192.

(*o*) *Brass v. Maitland*, 6 Ell. & Bl. 486; *Gibbon v. Paynton*, 4 Burr. 2298; *Batson v. Donovan*, 4 B. & Ald. 33, 37

(*p*) *Byles, J., Van Toll v. S. E. Ry. Co.*, 12 C. B. N. s. 75; 31 Law J. C. P. 245; *Peek v. North Staff. Ry. Co.*, 10 H. of L. Ca. 473. This subject is more fully illustrated, *post*, Ch. II., sect. 4; *Carriers, Passengers, Luggage*, p. *544.

The right of lien, when once established, is not destroyed by reason of the remedy for the recovery of the debt secured by the lien being barred by the statute of limitations. (*q*) And it will exist although it arises out of an immoral consideration; if the plaintiff cannot recover without relying on the immorality, on the principle of *in pari delicto potior est conditio possidentis*. (*r*)

Right of Lien. — If a defendant, having a lien upon goods, refuses to deliver them up on demand, and claims to retain them on grounds quite distinct from a claim of lien, his refusal will be evidence of a conversion, and the existence of the lien will be no answer to an action for the conversion of the property. (*s*) But a person does not waive his right of lien merely by omitting to mention it when the goods are demanded; and if he claims a right to detain them, in respect of two separate sums claimed to be due to him, and he has a lien only in respect of one of those sums, his refusal is no evidence of a conversion, unless the sum in respect of which the lien exists is tendered. (*t*) “Where a person,” observes Alderson, B., “has no right of property in goods in his possession, but merely a right of lien, he has no right to sell them; and if he does sell the goods, he thereby puts an end to his lien;” (*u*) but where goods have been deposited as security for a loan of money to be repaid on a day certain, there is an implied power of sale in case of default in payment on the day named. (*x*) An unauthorized dealing with a pledge will not, it seems, revest the property in the pledgor, though it may give him a right of action for any damage actually caused by such unauthorized proceeding. (*y*) And it has been held, that a lender of money on the security of railway stock has no right to realize the security during the currency of the loan, and that if

(*q*) *Spears v. Hartley*, 3 Esp. 81; 281; *Kerford v. Mondel*, 28 Law J. Exch. 303.
Re Broomhead, 16 Law J. Q. B. 303.

(*r*) *Taylor v. Chester*, L. R. 4 Q. B. 309; 38 L. J. Q. B. 225.

(*s*) *Cannee v. Spanton*, 8 Sc. N. R. 714; 7 M. & Gr. 903; *Dirks v. Richards*, 5 Sc. N. R. 534; 4 M. & Gr. 374; *Weeks v. Goode*, 6 C. B. N. s. 367.

(*t*) *Scarf v. Morgan*, 4 M. & W.

(*u*) *White v. Spettigue*, 13 M. & W. 608.

(*x*) *Pigot v. Cubley*, 15 C. B. N. s. 701; 33 Law J. C. P. 134.

(*y*) *Donald v. Suckling*, L. R. 1 Q. B. 585; *Halliday v. Holgate*, L. R. 3 Exch. 299.

he does so, the owner may recover from him the price he got for the stock, if it is to his interest to do so. (z)

[*422] * Where the plaintiff had agreed to buy of the defendant a stack of hay for £86, to be paid for when taken away, and to be removed by the 31st of May, and part only of the hay was paid for and removed by the time appointed, whereupon the defendant, in the month of August following, cut up and consumed the residue of the hay, and the plaintiff afterwards tendered the unpaid purchase-money and demanded the hay, and sued the defendant for converting it to his own use, it was held that the defendant's lien on the hay was determined by the act of conversion; that from the moment the defendant used the hay in a manner inconsistent with his claim of lien, his lien ceased, and a right of possession accrued to the purchaser. (a) Where, however, some apples which had been sold by the defendant to the plaintiff at an agreed price, to be paid on a given day, were deposited in a kiln in an outhouse on the defendant's premises, and the key of the kiln was given by the defendant to the plaintiff, but the defendant kept the key of the outer door of the outhouse, and, the day of payment being passed, the defendant gave the plaintiff notice to take and pay for the apples, and, no attention being paid to this notice, the defendant carried them away and resold them, and the plaintiff then brought an action for a conversion of them, it was held that the defendant was entitled to a verdict under a plea denying the plaintiff's right of possession of the apples. (b)

A Person cannot set up a Right of Lien which is at Variance with the Terms or Conditions, or Implied Understanding, upon which he received the Property. — Thus, if a livery-stable keeper takes in a horse to be stabled and fed for hire, upon the understanding that the horse is to be re-delivered to the owner whenever he requires it, the livery-stable keeper has no right of lien upon the horse for his keep, (c) or for money paid by him to a veterinary surgeon for blistering the horse according to the

(z) *Langton v. Waite*, L. R. 6 Eq. Ca. 165.

(a) *Gurr v. Cuthbert*, 12 Law J. Exch. 309.

(b) *Milgate v. Kebble*, 3 M. & Gr. 100; 3 Sc. N. R. 358.

(c) *Judson v. Etheridge*, 1 C. & M. 743; *Yorke v. Grenaugh*, 2 Ld. Raym. 868.

owner's directions, (*d*) the right of the owner to the possession of the horse for the purpose of riding him being deemed inconsistent with the right of lien. The livery-stable keeper, indeed, who holds a horse at the constant disposal of the owner, is the mere servant of the latter, and has nothing more than the bare custody of the animal. This is the case also with the agister of milch cows, who receives them to be depastured, agisted, or fed, the owner having a right to the possession of the cows whenever he requires them for the purpose of milking. (*e*) And if a trainer of race-horses holds * them on the understand- [*423] ing that the owner may send them, to be ridden by a jockey of his own choice at any race he chooses, and the trainer cannot lawfully refuse to deliver them to the owner for such a purpose, that state of things is inconsistent with the existence of a right of lien. (*f*) If a policy of insurance is deposited for safe custody only, the depositary cannot set up a lien upon it for an antecedent debt. (*g*) If a person receives a bill of exchange to get it discounted, and pay over the proceeds to the owner, or apply them in some specified manner, he has no lien upon the bill for money that may be due to him from the latter. (*h*) If a ship-factor receives the certificate of registry of a ship in order to pay the tonnage dues, he has no lien upon it for a debt due to him from the ship-owner. (*i*) Whenever goods in the hands of a bailee or depositary are by the terms of the contract to be re-delivered to the owner at some stated period, or "if by the agreement the plaintiff is to have the goods immediately, and the payment in respect of them is to take place at a future day, the bailee cannot set up any lien." (*k*) A lien is wholly inconsistent with a dealing on credit, and can only exist where payment is to be made in ready money, or security is to be given the moment the work is completed. (*l*) "If security" (such as a bill, note, or bond) "is taken for the debt for which the party

(*d*) *Orchard v. Rackstraw*, 19 Law J. C. P. 303.

(*e*) *Jackson v. Cummins*, 5 M. & W. 342; *Chapman v. Allen*, Cro. Car. 273.

(*f*) *Forth v. Simpson*, 13 Q. B. 685.

(*g*) *Muir v. Fleming*, D. & R., N. P. C. 30.

(*h*) *Key v. Flint*, 8 Taunt. 23; 1 Moore, 451; *Buchanan v. Findlay*, 9 B. & C. 749.

(*i*) *Burn v. Brown*, 2 Stark. 273.

(*k*) *Crawshaw v. Homfrey*, 4 B. & Ald. 52.

(*l*) *Raitt v. Mitchell*, 4 Campb. 146.

has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone.' (*m*)

If a person, when goods are demanded of him, rests his refusal to deliver them up on grounds quite distinct from any claim of lien, he cannot afterward, on finding that those grounds fail him, put forward a claim of lien as a justification for his refusal. Where, therefore, a warehouseman on being applied to for brandy which had been delivered to him for safe custody, refused to give it up, saying that it was his own property, it was held that he could not afterward justify his refusal on the ground that warehouse rent was due to him, and was not tendered at the time the brandy was demanded, (*n*) "for it would be absurd to offer the expenses of keeping the goods to one who insisted on retaining them as his own property." (*o*) But a person does not, of course, lose his right of lien by merely omitting to mention it when the goods are demanded.

[*424] And if he claims a right to retain them for *two separate charges, and has a lien only in respect of one of them, this will not dispense with the necessity of a tender of the one in respect of which the lien exists. (*p*)

Parties against whom a Lien may be claimed.—A mere trespasser or wrong-doer, who gets possession of property without the consent of the owner, cannot in general deal with it so as to create a right of lien thereon as against the true owner, (*q*) unless the person in whose possession the property is placed is a public innkeeper, or common carrier, or common ferryman, or is bound to exercise his craft in favor of all who require his services. Where the owner of a pony phaeton intrusted the phaeton to a painter to be painted, and the latter carried it to the premises of the defendant, who was in the habit of taking carriages to stand on his premises for hire, and there left it, and, the phaeton never having been painted or brought back, the plaintiff, after the expiration of three months, made search for

(*m*) *Hewison v. Guthrie*, 3 Sc. 298; 2 B. N. C. 759; *Cowell v. Simpson*, 13 Ves. 280; *Horncastle v. Farran*, 3 B. & Ald. 497.

(*n*) *Boardman v. Sill*, 1 Campb. 410, u.; *Weeks v. Goode*, 6 C. B. N. s. 367.

(*o*) *White v. Gainer*, 9 Moore, 45.

(*p*) *Scarfe v. Morgan*, 4 M. & W. 281.

(*q*) *Hartop v. Hoare*, 3 Atk. 44; *Lemprière v. Pasley*, 2 T. R. 485; *Castellain v. Thompson*, 13 C. B. N. s. 105.

it, and found it on the premises of the defendant, who claimed a lien on it for the price of the standing-room, it was held that the defendant had no such lien. (*r*) And where a chaise, which had been broken by the negligence of a servant, was taken by the latter to a coach-maker's, without the knowledge or sanction of the master, and was there repaired, it was held that the coach-maker had no lien upon the chaise as against the master for the price of the repairs. (*s*) It would seem also, from the adjudged cases, that if a servant is directed to take a carriage to A to be repaired, and he by mistake takes it to B, B would have no lien upon it for the price of the repairs, as the servant was not authorized to employ B in the matter. This may be law, but it is hardly just, and opens a wide door to fraud, as it is impossible for the coach-maker to be cognizant of the particular directions given by the master to the servant. If the servant has received general directions to get the carriage repaired, he may then, of course, give a right of lien to any coach-maker he may employ to do the repairs. (*t*) It has been held, that if a person obtains the property in goods by fraud, and pawns them before the seller has avoided the contract, the pawnee is entitled to a lien upon them for the money advanced, as against the seller. (*u*) But the possession of the goods by the pawnor must have been obtained by virtue of a contract intended to pass the property to him. If a person pawns with another property to * which he has no color of [*425] title, the *jus tertii* may always be set up against the pawnor by the pawnee. (*x*)

General lien is a right on the part of the manufacturer or workman, factor, broker or commission agent for the sale of goods, warehouseman or wharfinger, into whose hands goods have been placed to be worked up, repaired, improved, sold, or taken care of for hire, in the ordinary course of their trade or employment, to retain possession of them, not only until they

(*r*) *Buxton v. Baughan*, 6 C. & P. 674. E. 499; said to be a good law by Parke, B., in *Load v. Green*, 15 M. & W. 219;

(*s*) *Hiscox v. Greenwood*, 4 Esp. 174. and Cresswell, J., in *White v. Garden*, 20 Law J. C. P. 168.

(*t*) *Weldon v. Gould*, 3 Esp. 268.
 (*u*) *Parker v. Patrick*, 5 T. R. 175; (*x*) *Cheesman v. Exall*, 6 Exch. 345.
 doubted in *Peer v. Humphrey*, 2 Ad. &

have received payment of the hire due to them for their services in the particular employment, but for the general balance due to them from their employer in the ordinary course of dealing for work and services of the like nature bestowed at other times upon other goods of the employer. This right depends either upon the express agreement of the parties, or the custom and usage of the particular trade or business. The onus of making out and establishing the right, whether it exists by agreement or by custom, lies upon the person claiming it. When custom and usage of trade are relied upon as establishing the right, the usage must be shown to have governed the parties in their previous dealings together, or to prevail to such an extent that the contracting party must be supposed to be cognizant of it, and to have contracted subject to the usage; but as the right is an encroachment upon the ordinary rules and principles of the common law, it is regarded with jealousy by the courts, and requires the strongest proof.

Where persons carry on a trade or business in which a general lien is recognized, they cannot claim a general lien in respect of goods or securities which are, by agreement, held for a particular purpose, or under special conditions inconsistent with the claim of a general lien. (*y*) A general lien cannot be set up in opposition to the terms and conditions upon which the goods were received. Thus, if a broker or factor receives goods to sell, and applies the proceeds in some particular manner, he cannot set up a lien for his general balance, because a lien of this nature would be utterly inconsistent with the terms upon which he acquired possession of the goods. (*z*) And if a debtor deposits a bill of exchange with his creditor, in order that the latter may get the bill discounted and pay over the proceeds to the debtor, the creditor cannot set up a lien upon the bill for the general balance due to him. (*a*) In some places, dyers, calico-printers, fullers, warehousemen, wharfingers, and [* 426] packers, have been held, in accordance with *the proved usage of their several trades in the particular locality, to have a lien on goods sent to them to be dyed, printed,

(*y*) *Bock v. Gorrisen*, 2 De G. F. & J. 434; 30 Law J. Ch. 42.

(*z*) *Walker v. Birch*, 6 T. R. 262.

(*a*) *Key v. Flint*, 1 Moore, 451; 8 Taunt. 21.

warehoused, worked upon, or taken care of, not only for the work done upon, or in respect of, the particular goods in their possession, but also for their charges of dyeing, printing, warehousing, &c., other goods which had previously been delivered back to their owners; (b) and in other places, where no such usage has been shown to exist, they have been held to have no such general lien. (c) The usage, when it exists, must be shown to be long established and notorious, fair and reasonable, and not contrary to any established principle of law. (d) It has been held that a publisher has a lien upon any one or more parts or numbers of a work, for his charges and disbursements for printing or publishing the various numbers, though not consecutive, of an entire work; (e) also that an agent who carries on business, in his own name, on behalf of an undisclosed principal, has a lien on the business, the stock employed in it, and the debts owing to it, to the extent of the liability which he has incurred in the conduct and management of the business. (f)

Notice that Goods will be held subject to a General Lien. —

The right to retain for a general balance may, with certain exceptions presently noticed, be created by the express contract of the parties. Every workman and artificer not being a public innkeeper, common carrier, or common ferryman, and not being bound to exercise his calling in favor of all persons who may require his services, has a right to prescribe the terms upon which he will receive goods into his possession to be dealt with in the ordinary course of his trade, and may by express notice reserve to himself a general lien, if he thinks fit so to do. Thus, where the dyers, dressers, bleachers, whisters, printers, and calenderers of Manchester, and the neighborhood, came to a public resolution or agreement, at a public meeting in Manchester, that they would receive goods to be dyed, dressed, bleached, &c., on

(b) *Savill v. Barchard*, 4 Esp. 52; *Naylor v. Mangles*, 1 ib. 109; *Spears v. Hartley*, 3 ib. 81; *Rose v. Hart*, 8 Taunt. 499; 2 Moore, 547; *Webb v. Fox*, 2 Peake, N. P. C. 167.

(c) *Green v. Farmer*, 4 Burr. 2214; 1 W. Bl. 651; *Holderness v. Collinson*, 7 B. & C. 216.

(d) *Rushforth v. Hadfield*, 6 East, 528; *Leuckhart v. Cooper*, 3 Sc. 521; 3 B. N. C. 99.

(e) *Blake v. Nicholson*, 3 M. & S. 167.

(f) *Foxcraft v. Wood*, 4 Russ. 488.

the condition that such goods should not only be subject to the debts for the work and labor performed upon them, but also for the general balance due from the persons employing them for work and labor of the same kind performed upon goods which they had already delivered out of their possession, it was held that persons who had sent goods to the dyer or fuller, with notice of this resolution, conceded to them a lien for their general balance. (*g*)

[*427] * **General Lien by Custom of Trade — Warehouse-keepers — Wharfingers.**¹ — Where certain public warehouse-keepers of the city of London claimed a right to retain various bales of wool under an ancient custom of that city, for all public warehouse-keepers to have a general lien upon all goods from time to time housed in their warehouses in the name of the merchants or other persons by whom such public warehouse-keepers were employed, for all moneys or any balance thereof due from such merchants to such public warehouse-keepers for their advances, expenses, and charges, &c., it was held that the custom was bad, as the general lien claimed was not confined to goods, the property of the person who employed

¹ It is a recognized principle of American law that warehousemen and wharfingers have, like other bailees for hire, a lien upon the goods for their charges. Edwards, Bailments, sects. 350, 364; Story, Bailments, sect. 453 a.; Schouler, Bailments, pp. 122-128; U. S. Dig. tit. *Warehousemen*, sect. 44.

The bailee of personal property can impose no lien thereon as against the owner without his knowledge and consent. *Small v. Robinson*, 69 Me. 425. Where a carrier stores the goods with a warehouseman, at the place of delivery, the warehouseman's lien for storage is superior to the carrier's for his freight. *Powers v. Sixty Tons of Marble*, 21 La. Ann. 402.

On the lien of warehousemen for storage of cotton as against that of the landlord of the premises where the cotton is raised, see *Dobbins v. Clark*, 59 Ga. 709. The bailee's lien is lost by voluntary relinquishment of his possession of the goods or by giving credit for his dues. *Tucker v. Taylor*, 53 Ind. 93; *Robinson v. Larrabee*, 63 Me. 116. He can then only bring action against the party indebted. *Garrard v. Moody*, 48 Ga. 96. See, further, *Blackman v. Pierce*, 23 Cal. 508; *Board of Trade v. Buckingham*, 65 Ill. 72; *Farrington v. Meek*, 30 Mo. 578; *Wilson v. Martin*, 40 N. H. 88; *Lovett v. Brown*, ib. 511; *Hazard v. Manning*, 8 Hun, 613; *Rodgers v. Grothe*, 58 Pa. St. 414.

A wharfinger has a lien for his advances for freight. *Sage v. Gittner*, 11 Barb. 120.

On the jurisdiction of State and Federal courts over a lien for wharfage, consult *Brookman v. Hamill*, 43 N. Y. 554.

(*g*) *Kirkman v. Shawcross*, 6 T. R. 14.

or retained the warehouse-keeper. "The custom," it was observed, "if supportable, would make the goods of a foreign merchant, which have been consigned to a London factor for sale, and by him put into the warehouse of the warehouse-keeper for safe custody, liable to a private debt of the factor for expenses incurred in respect of other goods of third persons, which had been in his hands at former times, for charges contracted upon such goods, during any antecedent period of time, and that to an unlimited extent; which would be unreasonable and unjust, and obviously prejudicial in a very high degree to foreign trade, for no foreign merchant would consign his goods to this country for sale, if they could be made liable whilst warehoused for custody, to satisfy a debt already due from the factor to the warehouse-keeper, in respect of other goods. (*h*) Dock companies have no general lien for wharfage charges, and cannot detain the goods of one man to satisfy wharfage dues and charges incurred by another. (*i*) If a wharfinger has a general authority to receive all goods directed for A B, and goods come to his wharf directed by mistake for A B, the real owner of the goods cannot take them away without paying the charges incident to those particular goods; but it is equally clear that the wharfinger could not set up a lien on such goods for a general balance of accounts due from A B to him. (*k*)

Extinguishment of Lien by Abandonment of Possession.— If a bailee who has a right of lien upon property in his possession voluntarily parts with the possession of such property, the lien is gone; so that if he afterward recovers possession of the property his right of lien does not revive; (*l*) but if it is stolen or taken away by a trespasser or by fraud, and he gets it back again, his right of lien is not extinguished. (*m*) Possession of goods and chattels may be given up, and the right of lien extinguished, *although the goods and chattels are never [*428] actually removed from the premises of the party having

(*h*) Tindal, C. J., *Leuckhart v. Cooper*, 3 Sc. 531; 3 B. N. C. 99; 35 123.

Hen. VI., 33, cited *Rex v. Humphery*, 123.
(*i*) *Sweet v. Pym*, 1 East, 4.

McClell. & Y. 193. (*m*) *Wallace v. Woodgate*, R. & M.

(*i*) *Dresser v. Bosanquet*, 32 Law J. 194.
Q. B. 57; 4 B. & S. 460, 486.

the lien. (*n*) And, on the other hand, as the possession of the servant is the possession of the master, it follows that a depositary or bailee who has a right of lien upon goods in his possession does not lose his right by placing the goods in the hands of his servant or agent for custody, who is to hold them at his disposal. Warehousekeepers and wharfingers to whom goods have been delivered by masters of ships for safe custody, have been held to be the servants of such masters, holding the goods at their disposal, so as to preserve the shipmaster's lien for the freight after the goods have been taken out of the ship. (*o*)

The right of lien being a mere personal right, which cannot be parted with, it follows that a bailee who has got a lien cannot sell his right to another, nor can he transfer, as we have just seen, the property over which the lien extends, to another, without losing his right of lien, (*p*) unless the property has been pledged to secure the repayment of money advanced, with an express or implied power of sale, (*q*) for there is a clear distinction in this respect between a lien, which is a mere personal right of detention, and a pledge deposited to secure the repayment of money. (*r*) An innkeeper, consequently, cannot sell the horse of his guest for the expense of his keep, except within the city of London. (*s*) A sheriff cannot sell an interest of this description, and he cannot, consequently, seize property covered by the lien under an execution against the party claiming the lien; (*t*) but if the execution is against the owner of the goods, he is entitled then to seize them, after tendering the amount of the debt for which they are a security. A person may, as we have before seen, reserve to himself, by express contract, a right to take and to hold goods as a security for the payment of a debt, so that he will be entitled to resume possession of the goods after he has parted with them, and to re-establish his lien, provided the rights of no third person have intervened.

Statutory Power of Sale in Discharge of a Right of Lien. — By the Merchant Shipping Act, 1862, power is given to wharf

(*n*) *Jacobs v. Latour*, 2 M. & P. 205.

(*o*) *Reeves v. Capper*, 5 B. N. C. 585.

136.

(*p*) *Clerk v. Gilbert*, 2 B. N. C. 357.

(*q*) See *Johnson v. Stear*, 33 L. J. C. P. 130.

(*r*) *Donald v. Suckling*, L. R. 1 Q. B.

585.

(*s*) *Jones v. Pearle*, 1 Str. 556.

(*t*) *Legg v. Evans*, 6 M. & W. 42;

see *Young v. Lambert*, L. R. 3 P. C. Ca. 142.

or warehouse owners, in certain cases, to sell by public auction goods placed in their custody, and apply the proceeds of the sale in satisfaction and discharge of the charges upon them. (*u*)

Tender of the Debt in Extinguishment of the Right of Lien.—

Wherever a person has a lien upon goods for the payment of * money due upon them, whether he be an [* 429] unpaid vendor in possession of goods sold, or a manufacturer or workman in possession of goods that have been worked up or repaired by him, or a pledgee holding chattels as a security for a debt, the lien may be at once extinguished, and a right to the possession of the goods created, by a tender of the money due upon them. (*x*) Where a lease was deposited with the defendants as a security for the repayment of £150 on a promissory note payable on demand, and the defendants agreed that they would not enforce their remedy upon the note so long as the maker should duly pay the interest thereon, the rent of the premises, and what might from time to time be due to them for beer, and if he failed in any of these respects, the defendants were to be at liberty, after notice, to sell the lease and to deduct the expenses of the sale, the principal money and interest, and any account then due from the plaintiff to the defendant, it was held that the moment the amount of the note was paid or tendered, there was an end of all the stipulations as to what should be done with the lease in the event of the non-payment of the note and interest, and that the plaintiff had a right to maintain an action of detinue to recover back his lease. (*y*)

Transfer of the Bailment.— In all cases of bailment of chattels by one person to another for hire or reward, it is essential that the bailee should preserve his dominion and control over the property, and his power of restoring it to the owner. If, therefore, he parts with the possession of the chattel, and places it under the dominion and control of a stranger, the bailment is determined, and the owner has a right of action for the recovery of the thing bailed. (*z*)

Where, after a bailment of chattels, the bailor has transferred all his interest in the chattels to another, the bailee is entitled

(*u*) 25 & 26 Vict. c. 63, sects. 73-76.

(*y*) *Chilton v. Carrington*, 15 C. B.

(*x*) *Ratcliff v. Davies*, Cro. Jac. 105.
244.

(*z*) *Cooper v. Willomat*, 1 C. B. 682.

to have an order or authority from the bailor to deliver them to his transferee, or a reasonable time to make inquiry and ascertain the validity of the new title of the claimant before he can be made responsible in damages for the non-delivery of the chattels to the latter. (a) Where, for example, goods have been bailed by the owner to a warehouse-keeper to be kept, and the owner has subsequently sold the goods to a purchaser, the warehouse-keeper is not responsible for refusing to deliver the goods to the purchaser without the production of a delivery-order from the bailor, or some documentary evidence of title to the goods on the part of the stranger who demands [* 430] them; but he may, if he *pleases, at once attorn to the purchaser, and rely upon the title of the latter. (b)

If the bailee has received the chattels upon the terms that he is to deliver them to the bailor, or to any person authorized by him to receive them, a *bona fide* purchaser or mortgagee who is in possession of a bill of sale, or assignment, or mortgage, executed by the bailor, transferring all the bailor's interest in the chattels to such purchaser or mortgagee, may, on presenting such bill of sale or mortgage to the bailee, lawfully demand possession of the chattels, and in case of the refusal of the latter to deliver them to him within a reasonable time after the demand, may maintain an action for the conversion or detention of the property, (c) the bill of sale or mortgage, signed by the bailor, being an authority or direction to the bailee to deliver up the chattels to the purchaser or mortgagee; but if there be a mere oral agreement of sale, and no warrant, or authority, or direction from the bailor for the delivery of the goods, the refusal of the bailee to deliver them to the stranger would be no proof of a conversion or of a wrongful detainer. It is to a case of this sort, where there has been a mere oral transfer of chattels by a bailor, without any warrant or authority from the latter to the bailee to deliver them to the transferee, that the dictum of Holt, C. J., must be taken to apply, that if A bail

(a) Add. on Torts (5th ed., by Cave), p. 465; *Lee v. Bayes*, 18 C. B. 607; 25 Law J. C. P. 249; *Solomons v. Dawes*, 1 Esp. 82.

(b) *Ogle v. Atkinson*, 5 Taunt. 762;

Cheesman v. Exall, 6 Exch. 344; Add. on Torts (5th ed., by Cave), p. 465.

(c) *Franklin v. Neate*, 13 M. & W. 484; 1 Roll. Abr. *Detinue* (C), 2, 3; Add. on Torts, *supra*.

goods to C, and after give his whole right to them to B, B cannot maintain *detinue* for them against C, because the special property that C acquires by the bailment is not thereby transferred to B. (*d*) If the right of property in the subject-matter of the bailment has been transferred by devise, the devisee may sue for the detention or loss of the property, and it is no answer to the action to show that the subject-matter of the bailment was lost in the lifetime of the devisor, and has not been in the possession of the bailee since the accrual of the title of the devisee. (*e*) So if the right of property in title-deeds, or an heirloom, comes to the heir-at-law by descent, the heir is the proper person to sue for their detention. (*f*)

If the bailor is not himself the owner of the goods, but has some special property therein, or is himself a bailee of them, and answerable over to the real owner, he is entitled to maintain an action for damage done to them, or for the loss of them. (*g*)

A bailee is not estopped, as we have seen, from showing that the bailor had a defeasible title, and that his title has been *defeated by matter subsequent to the bailment or [*431] to the recognition of the title by the defendant. (*h*) He may refuse to re-deliver the goods to the bailor on the ground that they are the property of another person who has demanded and received them, or who has forbidden the bailee to part with the possession of them; (*i*) but the bailee cannot, if the possession of the bailor was a lawful possession, and the bailment was not founded in fraud, of his own accord set up the *jus tertii*. (*k*) He can set up the title of another only "if he defends upon the right and title and by the authority of that person." (*l*) But if the bailor was a trespasser or a thief in possessing himself of the goods, or the bailment was made with intent to defraud, the bailee may justify his refusal to deliver them up to the bailor, whether the true owner has or has not interposed to prevent delivery.

(*d*) Rich *v.* Aldred, 6 Mod. 216.

(*e*) Goodman *v.* Boycott, 2 B. & S. 1; 31 Law J. Q. B. 69.

(*f*) Bro. Abr. *Detinue*, pl. 30, 45.

(*g*) Freeman *v.* Birch, 1 N. & M. 420; Nicolls *v.* Bastard, 2 C. M. & R. 660.

(*h*) Thorne *v.* Tilbury, 3 H. & N. 534; 27 Law J. Exch. 407.

(*i*) Shelbury *v.* Scotsford, Yelv. 22; Biddle *v.* Bond, *ante*, p. *360.

(*k*) Armory *v.* Delamirie, 1 Str. 505.

(*l*) Pollock, C. B., Thorne *v.* Tilbury; Blackburn, J., Biddle *v.* Bond, *ut sup.*;

Where the plaintiff in an action for the detention of plate proved that he had pawned the plate with the defendant, and afterward sought to redeem it, and tendered the amount due upon it, but the defendant refused to deliver it up, it was held that the defendant might, under a plea alleging that the plate was not the property of the plaintiff, show that the plaintiff had, prior to the deposit of the plate with the defendant, transferred it by a bill of sale to a purchaser, who, nevertheless, allowed the plaintiff to continue in possession of it; that the plate had been deposited with the defendant in fraud of such purchaser, and that the defendant detained the plate by the order and under the authority of the latter. (*m*)

If the owner of goods has delivered them to a bailee to keep for him, so that the bailee has received the goods under a valid title, and the bailor, subsequently to the bailment, has, by bill of sale, transferred all his interest to a stranger, who demands the goods of the bailee, and the latter refuses to deliver them up until he has had time to receive the directions of the bailor, there is no evidence of a conversion. (*n*) In an action for a conversion of chattels, it was held by Lord Kenyon, that where the demand of the things for which the action is brought is not made by the owner, who deposited them with the defendant, but by another person on his account, and the defendant refuses to deliver them on the ground that he does not know [*432] whether the things belong to him or *not, and therefore keeps them till that is ascertained, or that the person who applies is not properly empowered to receive them, or until he is satisfied by what authority he applies, that is not such a refusal as is evidence of a conversion. (*o*) And if the defendant has a *bona fide* doubt as to the title of the claimant, it must be shown that reasonable time was given him for clearing up that doubt. (*p*) But if he sets up the title of his bailor, and affirms him to be the owner, or gives an absolute, unqualified

Bourne v. Fosbrooke, 34 Law J. C. P. C. P. 247; Sheridan v. New Quay Co., 164. 4 C. B. N. s. 618.

(*m*) Cheesman v. Exall, 6 Exch. 344. (*o*) Solomons v. Dawes, 1 Esp. 82.

(*n*) Lee v. Bayes, 18 C. B. 607; 25 Law J. C. P. 249; Europe & Austr. R. Exch. 201; 34 ib. 22.
M. Co. v. R. M. St. P. Co., 30 Law J.

refusal to deliver up the chattels, there is evidence of a conversion. (*q*) Where a pony-chaise was delivered to a workman to be painted, and the latter deposited it in the hands of a person who refused to deliver it up to the owner, unless the latter either produced the person who placed the chaise in his hands, or an order from him for its delivery, it was held that the owner was entitled to the possession of his property without doing either one or the other. (*r*)

Joint and Separate Rights of Action.—If a chattel has been deposited by two or more joint-owners of it in the hands of a bailee, who has agreed to keep it for them, it is not in the power of one of them to take it out of his hands without the consent of the others. If that were not so, each might demand the chattel, and have an action for its non-delivery, and so the bailee might be harassed with as many actions as there were joint-owners. (*s*) But if the bailee thinks fit to deliver up the goods to one of the joint-bailors, a joint-action by all of them cannot afterward be maintained against him, for the one who has got the goods cannot join with the others in suing for the non-delivery of them. (*t*) If several joint-owners allow one of them to deal with their property, and place it in the hands of a bailee, the latter is accountable to the owner with whom he deals, (*u*) “as if a charter be made to four, and one of them bails the charter to keep, he alone, without the others, may bring detainee; or all the owners may be joined as plaintiffs, except in the case of deposits of money in the hands of bankers.” (*x*) Where two persons were severally entitled to separate portions of the contents of a box delivered by their agent to a railway company, to be carried for both of them, and the box was lost, it was held that they might sue jointly for damages. (*y*)

Declarations against Bailees for Damage to Chattels.

—Where * the plaintiff's declaration alleged that the [*433]

(*q*) *Pillot v. Wilkinson*, *supra*; (*u*) *Martin, B., Walshe v. Provan*, 8
Woodley v. Coventry, 2 H. & C. 164. Exch. 852.

(*r*) *Buxton v. Baughan*, 6 C. & P. (*x*) *Thel. Dig. lib. ii., cap. 47, sect.*
 674. 8; *Broadbent v. Ledward*, 11 Ad. & E.

(*s*) *Attwood v. Ernest*, 13 C. B. 889; 211.
 22 Law J. C. P. 225. (*y*) *Metcalfe v. Lond. & Brighton Ry.*

(*t*) *Brandon v. Scott*, 7 Ell. & Bl. Co., 4 C. B. N. s. 319; 27 Law J. C. P.
 237; 26 Law J. Q. B. 163. 333.

defendant undertook, safely and securely, to raise up several hogsheads of brandy of the plaintiff then in a certain cellar, and to lay them down again in a certain other cellar, and that the defendant and his servants so negligently and carelessly put down the hogsheads in the said other cellar that, through want of care on their part, the casks were staved and a great quantity of brandy was spilt, it was held that the declaration disclosed a good cause of action, though it did not allege that the defendant was a common porter, or that he was to have any reward for his pains. (z)

Re-delivery of Materials furnished by the Employer. — If the bailor, before the work has been done, countermands the order for it, he has a right to the immediate return of the chattel, although by his having countermanded the order he may render himself liable to an action for a breach of contract. (a) If the bailee by mistake, or in obedience to a forged order, returns the chattel to the wrong person, and the article is lost, he is responsible for the loss. (b)

Contracts for the Performance of Work — Building Contracts,¹
— Prevention of Performance — Damages. — Where a contract has been entered into for the building of a house, and the owner refuses to permit the building to be completed, and prevents the workman from earning the stipulated remuneration, the measure of damages in respect of so much of the contract as remains unperformed is the difference between what the performance would have cost the plaintiff and the price which the defendant agreed to pay. (c) And in all cases of prevention of performance, where the plaintiff has been deprived by the defendant of the benefit of the contract, the plaintiff is entitled to recover what he has lost by the act of the defendant. (d)

When a contract for the performance of work and labor has

¹ A Manual of Engineering Specifications and Contracts, by Lewis M. Haupt (Phila. 1878), may aid those consulted on the preparation of contracts for construction of public buildings or works. Its scope, however, is practical; it does not embrace legal decisions.

(z) *Coggs v. Bernard*, 2 Ld. Raym. 909.

(a) *Lilley v. Barnsley*, 1 C. & K. 344.

(b) *Wilson v. Powis*, 11 Moore, 543; *Lubbock v. Inglis*, 1 Stark. 104.

(c) *Masterton v. Mayor, &c.*, *Brooke-tyre*, *ante*, p. * 402.

(d) *Planchè v. Colburn*, 1 M. & Sc. 51; *Inchbald v. West, &c.*, *Coffee Co.*, *post*, Discharge.

not been fully carried out by the workman, but the employer has, and retains, the benefit of a part performance, and the contract is divisible and apportionable, or the plaintiff has been discharged from his liability to complete the portion unperformed, the measure of the damages is the residue of the full sum agreed to be paid, after deducting such an amount as will enable the defendant to get the contract completed and carried out according to the original intention of the contracting parties. (e) If the plaintiff has contracted to do the work and supply materials for a fixed *sum, and the defendant after- [* 434] ward finds some of the materials, the defendant is entitled to deduct the fair value of his materials from the contract price. (f) Where a judgment had been recovered by the plaintiff against a relation of the defendant, and the latter promised the plaintiff that if he would forbear to issue execution upon the judgment the defendant would erect and finish a substantial house, and cause a lease thereof to be granted to the plaintiff, and the plaintiff promised that such lease, when granted, should be in full satisfaction of the judgment, it was held that the measure of damages arising from the breach of the defendant's promise was the value of the house, if it had been erected, and of the lease thereof, and not the difference between the value of the judgment and the value of the house and lease. (g)

SECTION II.

MASTER AND SERVANT.

Of Contracts of Hiring and Service.¹—The contract of letting and hiring relates as frequently to human labor and skill, care,

¹ See Wood, Mast. & S. particularly c. 3, implied contracts; c. 4, express contracts; c. 7, statute of frauds; c. 8, illegal contracts; c. 9, injuries to servant; c. 10, enticing away servant; c. 11, seduction; c. 12, master's liability for ser-

(e) *Ante*, pp. * 392-* 402; *Cutler v. Close*, 5 C. & P. 339.

(g) *Strutt v. Farlar*, 16 M. & W. 249; 16 L. J. Ex. 84.

(f) *Newton v. Forster*, 12 M. & W. 772.

and attention, as to movable and immovable property, realty, and personalty; the labor and services of workmen and artificers

vant's contract; c. 14, servant's liability; c. 15, master's liability to the servant; c. 16, co-servants; Schouler, Dom. Rel. (3d ed. 1882), Part VII., particularly c. 2, mutual obligations of master and servant; c. 3, servant's rights and liabilities as to third persons; c. 4, master's general rights and liabilities. See also Reeve, Dom. Rel. 339-378; Ewell, Lead. Cas. 102-111; U. S. Dig. tit. *Master and Servant*; ib. tit. *Services*.

The relation of master and servant does not arise between the contractor with the State for the services of contracts, and the convicts assigned to him; and he is not liable to a third person for the consequences of a convict's negligence in his work. *Cunningham v. Bay State, &c. Co.*, 32 Hun, 210.

One who contracts to labor for a specified term, and leaves the service before it is finished, cannot recover, unless act of the employer or inevitable accident prevented full performance. *Earp v. Tyler*, 73 Mo. 617.

Nature of a rector's contract in the Prot. Ep. Church with the parish, and his right to recover for services. *Perry v. Wheeler*, 17 Am. L. Reg. N. s. 24, and note, ib. 33. Bishop is not liable for salary of priest whom he engages. *Rose v. Vertin*, 46 Mich. 457. Requisites and validity of a school teacher's contract, and his right to recover for services. *School Directors v. Jennings*, 10 Ill. App. 643; *Ryan v. School Dist. No. 13*, 27 Minn. 433; *Atkins v. Van Buren*, 77 Ind. 447. Bank president, when not entitled to payment for services. *Pew v. First Nat. Bank*, 130 Mass. 391; *Citizens' Nat. Bank v. Elliott*, 55 Iowa, 104. Master is not entitled to money earned by servant for work for another person done out of business hours. *Wallace v. De Young*, 98 Ill. 638.

With respect to presumptions: where work is done by one person for another, a precedent request may be inferred from circumstances. *Trustees of Wabash, &c. Canal v. Bledsoe*, 5 Ind. 133. In regard to compensation, the law presumes a promise to pay an attorney at the statute rate; and the burden of proving that the attorney undertook to perform the services for a less rate, or without charge, rests upon the client. *Brady v. Mayor, &c.*, 1 Sandf. 569. The same presumption holds in regard to medical services, a promise to pay the physician being implied, and, in order to defeat his claim, affirmative evidence that such services were gratuitously rendered must be produced. *Re Scott*, 1 Redf. 234. So, in an action by a physician to recover for services, the plaintiff is deemed the best and the proper judge of the necessity of frequent visits; and in the absence of proof to the contrary, the court will presume that all the professional visits made were deemed necessary and were properly made. *Todd v. Myers*, 40 Cal. 357. As between father and son, the usual presumption of wages does not obtain, but it is presumed that the services of the one for the other were performed on account of the relation, and not for pay, and no obligation to pay is implied (*Harris v. Currier*, 44 Vt. 468); and this rule applies notwithstanding the son previously left his father under an agreement, giving him his time and earnings, but afterward returned (*Albee v. Albee*, 3 Oreg. 321). Where a husband and wife were living with his mother, and during the latter's illness the wife took care of her, it was presumed that the wife rendered the services in behalf of her husband. *Morgan v. Bolles*, 36 Conn. 175. A person accepting business within the line of his occupation will be presumed entitled to compensation, and the law will hold him to strict diligence within his business; but where the service rendered is outside his usual line, the presumption does not arise. *Morrison v. Orr*, 3 Stew. & P. 49. Church music in small country villages or hamlets being usually gratuitous, the

being daily hired to be employed in domestic affairs, in the cultivation of land, in the building of houses, in the manufacture of materials furnished to be worked up, and upon chattels which have been bailed or delivered to the workman to be mended or repaired. (a) In order to constitute a contract of hiring and service, there must be either an express or an implied mutual engagement binding one party to employ and remunerate, and the other to serve, for some determinate term or period (*ante*, p. * 5). It has been said that if the employer merely covenants to pay so long as the servant continues to serve, leaving it optional either with the servant to serve, or with the employer to employ, there is no contract of hiring and service. (b) But this decision has been doubted; (c) and if the servant binds himself to serve for some *determinate term, and the employer [*435] expressly or impliedly covenants or promises to retain the servant in his service for the term, there is a contract of hiring and service.

Where the plaintiff covenanted that his son should serve and continue with the defendant as his assistant in the art of a surgeon-dentist for five years, and should execute and perform such work and service in the art as the defendant should direct, and the defendant covenanted with the plaintiff that he would, during the term of five years, in case the son should well and faithfully serve, &c., pay him certain weekly wages, it was held that, as there was no express covenant on the part of the defendant to employ or retain the son in the defendant's service for five years, the defendant was at liberty to dismiss him whenever he pleased, and discontinue the payment of the weekly wages. (d) But this

mere fact that one sings in a choir or plays on an instrument as an accompaniment, during Sunday services, raises no implication of pecuniary liability against the corporate body; but such service will be presumed to have been gratuitous; and to authorize a recovery for services as an organist, it must be clearly proved that there was an actual employment of the plaintiff by the defendant, and a promise binding on the corporate body to pay the plaintiff. *Van Buren v. Reformed Church*, 62 Barb. 495.

(a) "Ostendit definitio, duo esse genera locationis, rerum unam, alteram operarum seu factorum."—*Vin. Com.* lib. 3, tit. 25, 757; *Pandect. Pothier*, lib. 19, tit. 2, art. 1.

(b) *Williamson v. Taylor*, 5 Q. B. 175.

(c) *Emmens v. Elderton*, 4 H. L. C. 624; 13 C. B. 495; *Whittle v. Frankland*, 2 B. & S. 49; 31 L. J. M. C. 81.

(d) *Dunn v. Sayles*, 5 Q. B. 685.

decision is not reconcilable with other authorities; and it is apprehended that, wherever one party covenants to serve for a particular period, and the other covenants to pay him a salary or wages for the service during the term, there is an implied covenant on the part of the latter to retain the servant in his service during the term, provided the latter serves faithfully, and is guilty of no misconduct warranting a dismissal. Where it was agreed between the plaintiff and a joint-stock company that the plaintiff should be the permanent attorney of the company, and should receive and accept a salary of £100 a year in lieu of his annual bill of costs, and should for such salary advise and act for the company on all occasions, it was held that there was an implied contract on the part of the company to retain the attorney in their service for one year at least, and pay him the salary he had agreed to accept, but that the word "permanent" did not confer any durable appointment beyond the year, so as to prevent the employer from withdrawing the retainer. (*e*)

Whenever one party agrees to retain or hire, and another agrees to serve for a certain term, at a specified salary, there is a contract of hiring and service, although the servant may never be called upon or required to do any work. There are many cases of hiring and employment of parties to serve in some particular character or capacity where the servant is bound to serve if called upon, and is entitled to his salary by holding himself in readiness to serve, although his services are not called into requisition by the employer. In these cases there is a continuous hiring or retainer; and the readiness and willingness to serve on the part of the servant are equivalent to actual service.

[* 436] * **Authentication and Proof of the Contract.** — A contract of hiring and service need not be authenticated by writing, unless the hiring exceeds a year in duration (*ante*, p. * 170); and if reduced into writing it need not be stamped, if it is a contract for the hire of "laborers, artificers, manufacturers, or menial servants," and not a contract of apprenticeship

(*e*) *Emmens v. Elderton*, 13 C. B. J. C. P. 84; *Pilkington v. Scott*, 15 M. 495; 4 H. L. C. 645; *Reg. v. Welch*, 2 & W. 660; *M'Intyre v. Belcher*, 32 L. Ell. & Bl. 362; *Rust v. Nottidge*, 1 Ell. J. C. P. 254.
& Bl. 99; *Hartley v. Cummings*, 17 L.

(*post*, p. * 453). In the absence of an express contract between the parties, a hiring may be presumed from the mere fact of the service, unless the service has been with near relations. If a man, for example, serves a stranger in the capacity of a clerk, or of a menial servant, or servant in husbandry, for a continued period, the law presumes that the service has been rendered in fulfilment of a contract of hiring and service; and if the party has served without anything being said as to wages, the law presumes that there was a contract for customary and reasonable wages. (*f*) But if the service has been with the parent or uncle, or other near relation of the party serving, a hiring cannot be implied or presumed from it, but an express hiring must be proved in order to support a claim for wages; for the law regards services rendered by near relations to one another as gratuitous acts of kindness and charity, and does not presume that they are to be paid for unless there is an express contract to that effect. (*g*) And if a poor person is taken out of charity and provided with food, lodging, clothes, and necessaries, and set to work, no contract of hiring and service is implied therefrom, however long the party may continue to serve. (*h*)

Yearly Hirings — Domestic Servants. — When the employment of a servant is of a permanent nature, and annual wages are reserved, the hiring is a yearly hiring; and when the servant is not a household or domestic servant, the hiring cannot be put an end to by either party without the consent of the other, before the termination of the current year. (*i*) A hiring of a servant in husbandry, for example, is an indefeasible yearly hiring, analogous to a yearly tenancy. At the end of each year a new contract arises to serve for the year commencing, which will continue as long as the parties may please, and can only be terminated at the end of the current year, unless the servant is guilty of misconduct. (*k*) A general hiring of a clerk, foreman, journey-

(*f*) Lord Ellenborough, C. J. 15 Bott. 209, c. 273; Cald. 521; R. v. East, 454; Phillips v. Jones, 1 Ad. & E. Stokesley, 6 T. R. 757.
333.

(*h*) R. v. Weyhill, 1 W. Bl. 206; 2

(*g*) Davies v. Davies, 9 C. & P. 87; Bott. 207, case 271.
Gregory Stoke v. Pitminster, 2 Bott. P.
L. C. 206, case 269; R. v. Sow., 1 B. & * 435.

Ald. 181; R. v. St. Mary Guildford, 2 (*k*) R. v. Lyth, 5 T. R. 337; 3 ib. 76.

man, or traveller, at annual wages, "with board in the house," is, in general, a yearly hiring, which can only be put an end to by consent, or at the expiration of the current year; (*l*) and so also is a general hiring of a governess at annual wages, with board in the house; (*m*) but the duration of the term of hiring will be regulated and controlled by custom and usage and the surrounding circumstances of the case. (*n*) A general hiring of postilions and ostlers upon the terms that they are to receive board and lodging in the house, and the vails or perquisites of the stables in lieu of wages, is a yearly hiring; (*o*) and so also is a general hiring of a warehousman, "the employer engaging to pay £12 10s. per month for the first year, and advance £10 per annum until the salary should be £180;" (*p*) also a general hiring of editors, sub-editors, reporters, and other persons regularly employed upon old-standing and permanently established newspapers and periodicals. (*q*) Reservations of quarterly, monthly, or weekly wages are not inconsistent with a yearly hiring. "Whether the wages be to be paid by the week or the year cannot make any alteration in the duration of the service, if the contract were for a year;" (*r*) but if there has been no continued service for a lengthened period, and there is nothing in the nature of the employment, and no particular custom or usage leading necessarily to the conclusion that the hiring was for a year, the payment of weekly or monthly wages raises a presumption in favor of a weekly or monthly hiring. (*s*) A "hiring for twelve months certain, and to continue from time to time until three months' notice in writing be given by either party to determine the same," is a hiring for a year certain only; and either party is at liberty to put an end to it at the expiration of the first year, by giving

(*l*) *Beeston v. Collyer*, 12 Moore, 552; *R. v. Batheaston*, Burr. Set. Cas. 823, No. 257; *Turner v. Robinson*, 5 B. & Ad. 789; 2 N. & M. 829; *Davis v. Marshall*, 9 W. R. 520.

(*m*) *Todd v. Kerrich*, 8 Exch. 151; 22 L. J. Ex. 1.

(*n*) *Fairman v. Oakford*, 5 H. & N. 636; 29 L. J. Ex. 459; *Green v. Wright*, 1 C. P. D. 591.

(*o*) Burr. Set. Cas. 759, No. 236; 2 Bott. 229, 230, pl. 294, 297.

(*p*) *Fawcett v. Cash*, 5 B. & Ad. 903.

(*q*) *Holcroft v. Barber*, 1 Car. & Kirw. 4; *Baxter v. Nurse*, ib. 10; *Williams v. Byrne*, 2 N. & P. 139.

(*r*) *Kenyon, C. J.*, 4 T. R. 246; *R. v. Seaton*, Cald. 440.

(*s*) *R. v. Pucklechurch*, 5 East, 384; *Baxter v. Nurse*, 7 Sc. N. R. 801; 6 M. & Gr. 935.

three months' previous notice. (*t*) It has also been held that an agreement "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving the other a three months' notice," can be determined at the end of the twelvemonth without notice. (*u*)

Indefeasible and Defeasible Yearly Hirings — Month's Warning or a Month's Wages. — If by the custom or usage of trade, the hiring may be put an end to and the contract dissolved, by notice given by either of the parties, the hiring is a conditional or *defeasible yearly hiring, determinable [*438] by giving the customary notice at any time during the term. By the custom of particular trades a general hiring of a commercial traveller is a hiring for a year, subject to an implied understanding that either party may determine the engagement by giving three months' notice. (*x*) A general hiring of menial or household servants, such as cooks, scullions, housemaids, footmen, butlers, coachmen, grooms, where no time is mentioned for the duration of the service, is a hiring for a year, and so on from year to year, defeasible by custom and usage, at the option of either of the parties, on giving a month's warning, or on the part of the master by paying or tendering a month's wages. If the contract is put into writing, the customary power of defeasance is impliedly annexed to the express terms of the written agreement, unless the custom is excluded by express words. (*y*) A servant may be a menial servant, and as such clothed with this implied power of defeasance, although he does not reside within the walls of the master's house. This has been held to be the case with a head gardener hired for a year at £100 wages, with a house in the master's grounds, and the privilege of taking in apprentices for a year at £15 premium; (*z*) also with a huntsman engaged at a salary of £100 a year, with a house to live in and perquisites. (*a*)

When a power of defeasance is vested in the parties either by

(*t*) *Brown v. Symons*, 8 C. B. N. S. 208; 29 L. J. C. P. 251.

(*u*) *Langton v. Carleton*, L. R. 9 Ex. 57.

(*x*) *Metzner v. Bolton*, 9 Exch. 518; 23 L. J. Ex. 130.

(*y*) *Johnson v. Blenkinsop*, 5 Jur. 870.

(*z*) *Nowlan v. Ablett*, 2 C. M. & R. 57.

(*a*) *Nicoll v. Greaves*, 17 C. B. N. S. 27; 33 L. J. C. P. 259.

custom or special agreement, or the contract is made defeasible upon the happening of a given event, the hiring is nevertheless a yearly hiring; so that, if the power of defeasance is not exercised, and the contract is permitted to run on, and the service to continue for a year, there is a year's hiring and service, which will gain a settlement under the poor laws. (*b*) "It is a yearly hiring, notwithstanding the power of determining it, if that is not exercised before the expiration of the year. The contingency not having happened, and the contract not having been defeated during the year, it inures after the year's service as a yearly hiring." (*c*) A servant may engage himself to serve for a certain determinate period, but may give the employer the option of determining the contract, and dismissing him at any period of the service. Where the engagement of a clerk or a superintendent was to be for three years, "at the option" [*439] of the employer, at a yearly salary, it was * held that this was a contract binding the servant to serve three years, and giving the employer the option of determining the contract at the end of each year by a proper notice, but not of dismissing the servant at any time; that the option to be exercised by the employer was whether the servant was to remain for one, two, or three years, and that if he was dismissed in the middle of a current year, he was entitled to compensation. (*d*)

Hiring by the Month and Week. — Where a journeyman miller was hired "at monthly wages, with liberty to depart at a month's wages or a month's warning," the hiring was held to be a hiring by the month (*e*); but when the wages are reserved weekly with a proviso for a month's warning, the presumption is in favor of a conditional and defeasible yearly hiring. If there be anything in the contract to show that the hiring was intended to be for a year, then a reservation of weekly wages will not control that hiring. But if the payment of weekly wages be the only circumstance from which the duration of the

(*b*) *R. v. Atherton*, Burr. Set. Cas. 203, No. 71; *R. v. Birdbrooke*, 4 T. R. 246; *R. v. Farleigh v. Wallop*, 1 B. & Ad. 340, 342; *R. v. New Windsor*, Burr. Set. Cas. 22, No. 7; *R. v. Gt. Yarmouth*, 5 M. & S. 114; *R. v. Northwold*, 2 D. & R. 792.

(*c*) *R. v. Sandhurst*, 7 B. & C. 562; 1 M. & R. 101; *R. v. Byker*, 3 D. & R. 336; 2 B. & C. 119; *R. v. Lidney*, Burr. Set. Cas. 1.

(*d*) *Down v. Pinto*, 9 Exch. 327; 23 L. J. Ex. 103.

(*e*) *R. v. Clare*, 2 Bott. 229, pl. 295.

contract is to be collected, it must be taken to be only a weekly hiring. (*f*) "The mere arrangement," observes Bayley, J., "that the wages shall be at one rate in the summer, and at another in the winter, does not show that the parties contemplated a service to endure through the summer and winter, and therefore that they intended a hiring for a year; but shows only that they intended that, if the servant, being hired at weekly wages, should remain till the summer, he should then have so much per week. The true meaning of such an arrangement is merely this: that the servant's wages as a weekly servant are to be regulated by the seasons." (*g*) But if the nature of the employment or the terms of the contract are inconsistent with a weekly hiring, the reservation of weekly wages will be regarded merely as a mode of payment, and not as an indication of the duration of the contract. (*h*) Thus the presumption of a weekly hiring resulting from a reservation of weekly wages is rebutted by a stipulation for a fortnight's or a month's notice to quit. (*i*)

Service at Will. — A boy was employed to work "fôr meat, drink, and clothes, as long as he had a mind to stop," and served for two years upon these terms; and the service was held to be a mere * service at will. (*k*) So where an [*440] assistant workman was "to come and go when he liked," and an ostler and his master were "to be at liberty to separate when they pleased," the service was held to be a service at will. (*l*) In these cases there is in truth no contract of hiring at all. (*m*) The transaction amounts merely to an authority to serve upon certain terms. If the work is actually

(*f*) *Ellenborough, C. J., R. v. Dodderhill*, 3 M. & S. 245; *Burr. Set. Cas.* 280, No. 98; *R. v. Pucklechurch*, 5 East, 384; *R. v. Hanbury*, 2 East, 425; *R. v. Mitcham*, 12 East, 352; *Ashurst, J., R. v. Newton Toney*, 2 T. R. 455; *R. v. Odiham*, ib. 622; *Baxter v. Nurse*, 7 Sc. N. R. 801; 6 M. & Gr. 935; *R. v. Elstack*, 2 Bott. 227, pl. 292; *R. v. Dedham*, 2 Bott. 227, pl. 292; *R. v. Warminster*, 9 D. & R. 70; *Evans v. Roe*, L. R. 7 C. P. 138.

(*g*) *R. v. Rolvendon*, 1 M. & R. 691;

R. v. Dodderhill, 3 M. & S. 243; *R. v. Lambeth*, 4 ib. 315.

(*h*) *Davis v. Marshall*, 9 W. R. 520.

(*i*) *R. v. Hampreston*, 5 T. R. 208; *R. v. St. Andrew Pershore*, 8 B. & C. 679; *R. v. Birdbrooke*, 4 T. R. 246; *R. v. Gt. Yarmouth*, 5 M. & S. 117.

(*k*) *R. v. Christ's Parish, York*, 3 B. & C. 459; 5 D. & R. 314.

(*l*) *R. v. Gt. Bowden*, 7 B. & C. 249.

(*m*) *R. v. St. Matthews, Ipswich*, 3 T. R. 449.

performed and accepted, the law raises an implied promise of remuneration from the employer to the workman ; but the former is not bound to provide the work, nor is the latter bound to execute it.

Rights and Liabilities of Master and Servant. — It is the first duty of the master, after the contract of hiring and service has been entered into, to take the servant into his employ, and enable him to earn the hire or reward agreed to be paid ; and if he neglects so to do, he renders himself liable forthwith to an action for a breach of contract. "The master is bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information, and belief ; but the law does not imply, from the mere relation of master and servant, an obligation on the part of the master to take more care of the servant than he may reasonably be expected to take of himself." (*n*) If the servant sustains injury in the course of his employment from the negligence of the master, the latter will be responsible in damages, (*o*) although there is no implied agreement by the master in an ordinary contract of hiring and service not to expose the servant to extraordinary risks in the course of his employment ; (*p*) but the master is not liable for surgical attendance and medicine rendered to a servant who has been injured in the execution of his master's service, unless the surgeon has been called in by the master's orders ; (*q*) nor for injuries sustained from the unseaworthiness of a vessel in which the servant is employed ; (*r*) nor for injuries which one servant has sustained through the negligence of another servant of the same employer (as we shall presently see), provided the master provides proper machinery, (*s*) and takes care that his

[* 441] servants are persons of * competent skill and ordinary

(*n*) *Riley v. Baxendale*, 30 L. J. Ex. 87; *Priestly v. Fowler*, 3 M. & W. 5; *Paterson v. Wallace*, 1 Macq. H. L. C. 748; *Davies v. England*, 33 L. J. Q. B. 321; as to injuries from unfenced machinery, see *Holmes v. Clarke*, 30 L. J. Ex. 135; 31 L. J. Ex. 356; 7 H. & N. 927.

(*o*) *Ashworth v. Stanwix*, 30 L. J. Q. B. 183; *Clarke v. Holmes*, 7 H. & N. 937; 31 L. J. Ex. 356; *Weems v. Math-*

ieson, 4 Macq. H. L. C. 215; *Mellors v. Shaw*, 1 B. & S. 437; 30 L. J. Q. B. 333.

(*p*) *Riley v. Baxendale*, 6 H. & N. 445; 30 L. J. Ex. 87.

(*q*) *Wannell v. Adney*, 3 B. & P. 247; *Cooper v. Phillips*, 4 C. & P. 581.

(*r*) *Couch v. Steel*, 23 L. J. Q. B. 121.

(*s*) *Searle v. Lindsay*, 11 C. B. N. S. 429; 31 L. J. C. P. 106.

carefulness; (*t*) for a servant, when he engages to serve a master, undertakes as between him and his master to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant, when he is acting in "the discharge of his duty as servant of him who is the common master of both." (*u*)

The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, he is just as likely to be acquainted with the probability and extent of it as the master. The master, therefore, is not responsible for injuries sustained by his servant through the viciousness of the horse which the servant is employed to groom, or through the breaking down of a van or carriage in which the servant is directed by the master to ride or drive, or from the employer's keeping an insufficient staff of servants for the performance of the work he has to do, (*x*) or through the use of dangerous machinery, with the use of which the servant is, or professes to be acquainted, and which he has voluntarily undertaken to use, (*y*) or for the dangers attendant upon the mounting of scaffolds, or unfinished staircases and landings, which the workman has voluntarily undertaken to mount, with as much knowledge of the attendant risk as the person who employs him. (*z*)

Where the master's coach broke down through the negligence of a coach-maker who had contracted with the master to furnish the latter with sound road-worthy coaches, and repair them, and keep them in good working order, and the coachman was mutilated and maimed for life, it was held that he had no remedy for

(*t*) *Potter v. Faulkner*, 1 B. & S. 800; 31 L. J. Q. B. 30; *Senior v. Ward*, 1 El. & El. 385.

(*u*) *Hutchinson v. York, Newc. & Berw. Ry. Co.*, 5 Exch. 343; 19 L. J. Ex. 296; *Wigmore v. Jay*, ib. 300; 5 Exch. 354; *Seymour v. Maddox*, 20 L. J. Q. B. 327; 16 Q. B. 326; *Lovegrove v. L. B. & S. C. Ry. Co.*, 16 C. B. N. S. 669; 33 L. J. C. P. 329; *Waller v. The S. E. Ry. Co.*, 3 H. & C. 102; 32 L. J. Ex. 205; *Murphy v. Caralli*, 3 H. & C. 462; 34 L. J. Ex. 14; *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291. As to

who are fellow servants, see *Hall v. Johnson*, 3 H. & C. 589; 34 L. J. Ex. 222, N. 32; *Feltham v. England*, L. R. 2 Q. B. 33; 36 L. J. Q. B. 14; *Warburton v. Great Western Ry. Co.*, L. R. 2 Ex. 30; 36 L. J. Ex. 9.

(*x*) *Skipper v. East. Co. Ry. Co.*, 9 Exch. 223.

(*y*) *Dynen v. Leach*, 26 Law J. Exch. 221.

(*z*) *Assop v. Yates*, 2 H. & N. 770; 27 Law J. Exch. 156; *Griffiths v. Gidlow*, ib. 404; *Potts v. Plunkett*, 9 Ir. C. L. R. 290.

the injury. The law does not permit him to recover damages from his own master and employer. Neither can he sue the coach-maker, whose negligence occasioned the injury. "It is no doubt a hardship upon the plaintiff," observes Rolfe, B., "to be without a remedy, but by that consideration we ought [*442] not to be *influenced." (a) "There would be no end of actions if we were to hold that a person having once done a piece of work carelessly, should, independently of honesty of purpose" (or contract), "be fixed with liability in this way by reason of bad materials or insufficient fastening." (b)

If a man employs ignorant, inexperienced workmen in dangerous employments, and exposes them improperly to risks, of which he is cognizant, and which are not known to the ignorant workman, he will be liable for the consequences of his misconduct. (c) For personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable. (d) And where rules are framed by employers for the purpose of regulating the management and exercise of a dangerous employment, and these rules are carelessly or improperly framed, so as to cause dangers and risks, which might be guarded against and prevented by proper rules carefully prepared, the employers will be responsible for the consequences of their negligence. (e) Where statutory regulations exist for the management of a colliery, (f) and securing the safety of the workmen, and these rules are culpably neglected with the knowledge of the owner of the mine, the latter will be responsible for the consequences of his neglect of duty, unless the person injured has brought the mischief upon himself by his own negligence. (g) And the same rules apply

(a) *Winterbottom v. Wright*, 10 M. & W. 115; *Priestley v. Fowler*, 3 M. & W. 6; *Riley v. Baxendale*, 6 H. & N. 455; 30 Law J. Exch. 87; *Potts v. Port Carlisle, &c. Ry. Co.*, 2 Law T. R. N. s. 283; *Heaven v. Pender*, 9 Q. B. D. 302.

(b) *Per Willes, J., Collis v. Selden*, L. R. 3 C. P. 498.

(c) *Bartonshill Coal Co. v. Reid*, 3 Macq. 295; *Mellors v. Shaw*, 30 Law J. C. P. 333; *Weems v. Matthieson*, 4 Macq. H. L. C. 215; *Farrant v. Barnes*, 31 Law J. C. P. 139.

(d) *Ashworth v. Stanwix*, 30 Law J. Q. B. 183.

(e) *Vose v. Lanc. & York. Ry. Co.*, 2 H. & N. 728; 35 & 36 Vict. c. 76.

(f) As to ventilation of collieries, see *Brough v. Homfray*, L. R. 3 Q. B. 771; as to statutory regulations under the factory acts, see 41 & 42 Vict. c. 16.

(g) *Caswell v. Worth*, 5 Ell. & Bl. 855; *Senior v. Ward*, 1 Ell. & Bl. 385; 28 Law J. Q. B. 139.

where machinery is required by act of Parliament to be protected, and the master will be responsible for the want of such protection, unless the accident has been caused by the negligence of the servant himself. (*h*) Where the dangerous nature of the employment is obvious, the servant must necessarily be taken to have known it; but even if it be known to the servant, yet that does not make him a "volunteer," so as to exonerate his masters from their liability for breach of a statutory duty to protect the servant from the dangerous thing. (*hh*) Where the Employers' Liability Act, 1880, applies, the law, as above stated, will be modified. See provisions of the act, *post*.

If a rule established for securing the safety of workmen in a dangerous employment is habitually violated, to the knowledge of *the workman himself, the latter has no [* 443] ground to recover damages from the employer for injuries sustained from the non-observance of the rule. (*i*)

A declaration alleging that the plaintiff was the servant of the defendant, and that the defendant ordered the plaintiff to ascend and use certain scaffolding, &c., well knowing it to be dangerous and unfit for use, and that the plaintiff, in obedience to the order of the defendant, used the scaffolding, &c., believing it to be safe and fit for use, and not knowing the contrary, and not having the same means that the plaintiff had of forming a correct opinion upon its sufficiency and safety, and that the scaffolding, &c., by reason of its being unsafe and unfit for use, gave way with the plaintiff upon it, and precipitated the plaintiff upon the ground, &c., discloses a good cause of action. (*k*)

If hidden and secret dangers exist upon the master's premises, known to him and unknown to his workmen, it is his duty to disclose them to the latter, that they may take precautions against them. (*l*) If a master was to order his servant to take a lighted candle amongst packages known by him, but not known by the servant, to contain gunpowder, the master would be responsible for any injury sustained by the latter from the un-

(*h*) *Post*, p. * 444.

(*k*) *Williams v. Clough*, 3 H. & N.

(*hh*) *Britton v. G. W. Cotton Co.*, 258; 27 L. J. Ex. 325.

L. R. 7 Ex. 130.

(*l*) *Williams v. Clough*, *supra*; *Mel-*

(*i*) *Senior v. Ward*, 1 EL. & EL. 385; *lors v. Shaw*, 1 B. & S. 444; *Ashworth v. Stanwix*, 30 Law J. Q. B. 183.

known danger and unexpected risk to which he had been exposed. So if a servant be employed to cut up diseased cattle. (*m*) It is otherwise if the servant accepts of the employment knowing of the risk he runs (see *infra*). If the danger is unknown to the master, and there is no negligence on his part, he cannot be made responsible in damages; (*n*) as where a floor of a warehouse gave way and injured a workman who was thereon. (*o*) So if a railway company employs workmen upon its tunnels, sidings, or stations, it is guilty of negligence if it conducts its traffic so as to expose the workmen to unexpected and unforeseen dangers which they had no means of guarding against. (*p*)

Exemption of the Master from Liability when the Danger is known to the Servant.— But the master is not responsible for the dangerous state of his premises, if those dangers are known to the servant, and the latter has accepted the employment knowing of the attendant risks, and having an opportunity of guarding against them by his own vigilance and care.

[* 444] Where the plaintiff alleged * that he had been hired by the defendant to perform at the defendant's theatre, and that on part of the stage there was a hole in the floor, along which the plaintiff had to pass in the discharge of his duty as a performer, and that it was the duty of the defendant to light the floor sufficiently, so as to prevent accidents to those who passed along it, it was held that no such duty was cast upon the defendant. "A person," observes Erle, J., "must make his own choice whether he will accept employment upon premises in this condition; and if he do accept such employment, he must also make his own choice whether he will pass along the floor in the dark, or carry a light. If he sustains an injury in consequence of the premises not being lighted, he has no right of action against the master who has not contracted that the floor shall be lighted." If the servant wishes the premises to be kept in any particular state with respect to lighting and fencing, he must provide for it by express contract. (*q*)

(*m*) *Davies v. England*, 33 L. J. Q. B. 321.

(*n*) *Potts v. Port Carlisle, &c. Co.*, 2 Law T. R. N. s. 283; 8 W. R. 524.

(*o*) *Brown v. Accrington Cotton Co.*, 34 L. J. Exch. 208.

(*p*) *Vose v. Lanc. & York. Ry. Co.*, 2 H. & N. 728; 27 Law J. Exch. 249.

(*q*) *Seymour v. Maddox*, 16 Q. B. 332; *Bolch v. Smith*, 7 H. & N. 736; 31 Law J. Q. B. 201; *Robertson v. Adam-*

Where the Workman is employed in the Use of Dangerous Machinery furnished by the employer, and is, or professes to be, acquainted with the use of the machinery, and the care necessary to be taken to guard against accident, and notwithstanding this, sustains injury from his own want of care and caution in the use of it, he has, of course, no ground of action against the employer. (r) But if an act of Parliament requires machinery to be fenced, and it is left unfenced, and the servant complains, and the master induces him to continue his work by telling him that proper protection shall be afforded, the master takes upon himself the responsibility of any accident that may occur. (s)

Injuries to Workmen from defective Hoisting-Tackle in Mines and Insecure Scaffolding and Ladders.—It has been held, in a Scotch case in the House of Lords, that the owner of a mine is bound to exercise ordinary care and vigilance to keep the shaft of the mine in a safe state, and the machinery for lifting people from the mine, and lowering them into it, in secure condition. (t) And it is in all cases the master's duty to be careful that his workman be not induced to work under the notion that the tackle, scaffolding, or rope with which he works is secure, when the master knows, or has reasonable ground for believing, that it is unsafe and dangerous. If he interferes in the conduct and management of the work himself, he is bound to select sound and safe materials; and if he *knowingly allows [*445] rotten timber, rotten poles, or rotten ropes to be used in the construction of a scaffold, and injury is sustained therefrom by his servants or workmen, he will be responsible in damages. (u) But if he does not in any way interfere himself, and employs a competent foreman to superintend the work and select the materials, and the foreman selects unsound and unsafe materials, or knows that those he has selected have become unsafe, which cause injury to the workmen working under the

son, 24 Sc. Sess. Cass. 1231; Potts v. Plunkett, 9 Ir. C. L. R. 290.

(r) Dynen v. Leach, 26 Law J. Exch. 221; Barton's Hill Coal Co. v. Reid, 3 Macq. 294; see Watling v. Oastler, L. R. 6 Exch. 73.

(s) Holmes v. Clarke, 30 Law J. Exch. 135; 31 ib. 356; Weems v. Mathieson,

4 Macq. H. L. C. 215. See also Britton v. G. W. Cotton Co., ante p. *442.

(t) Brydon v. Stewart, 2 Macq. 34.

(u) Roberts v. Smith, 26 Law J. Exch. 319; 2 H. & N. 213; Senior v. Ward, 28 Law J. Q. B. 139; Mellors v. Shaw, 1 B. & S. 444.

foreman's directions, the master is not responsible, as the default is not in him, but in the foreman and fellow-servant of the injured workman, and the case then ranges itself with that class of cases where it has been held, that the master is not responsible for injuries to one fellow-servant caused by the negligence of another fellow-servant in his employ. (*x*)

Injuries to one Fellow-Servant from the Negligence of another Fellow-Servant. — Where several servants are employed by the same master in one common employment, the master is not responsible for injury resulting to one of them from the negligence of another, provided the master has taken due care not to expose his servant to unreasonable risks, (*y*) and has been guilty of no want of care in the selection of proper servants. (*z*) The principle laid down is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service; and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both; (*a*) and when the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. Thus it has been held that a railway company is not responsible for an injury occasioned to one of their own servants by a collision on their railway, caused by the negligence of another of their servants, in respect of which injury they would undoubtedly have been liable if the person injured had been a stranger travelling as a passenger for hire. (*b*) But the servants

(*x*) *Wigmore v. Jay*, 5 Exch. 358; *post*, ch. V.; *Williams v. Clough*, 3 H. & N. 258; 27 Law J. Exch. 325; *Griffiths v. Gidlow*, *ib.* 404; *Farwell v. Boston, &c. Ry. Co.*, 3 Manq. 316; *Ormond v. Holland*, Ell. Bl. & Ell. 105; *Scott v. Craig*, 24 Sc. Sess. Cas. 789; *Searle v. Lindsay*, 11 C. B. N. s. 429; 31 Law J. C. P. 106; *Gallagher v. Piper*, 33 L. J. C. P. 329; *Feltham v. England*, L. R. 2 Q. B. 33. See, however, *Employer's Liability Act, infra*.

(*y*) *Hutchinson v. York Ry. Co.*, 5 Exch. 353.

(*z*) *Tarrant v. Webb*, 18 C. B. 805; see *Wilson v. Merry*, L. R. 1 Scotch & Div. App. 326.

(*a*) See *Morgan v. Vale of Neath Ry. Co.*, 33 L. J. Q. B. 260; *s. c.* in error L. R. 1 Q. B. 149.

(*b*) *M'Eniry v. Waterford*, 8 Ir. C. L. R. 312; *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291, in which case the plaintiff, a laborer, was being carried on the line, in pursuance of his contract of service with the company; *Hando v. Lond. Chat. & Dover Ry.*, L. R. 2 Q. B. 439, *n.*, *acc.*

* must be fellow-servants, engaged in a common service; (c) for if a farmer's servant, delivering corn at the warehouse of a corn merchant, is injured by the negligence of the corn merchant's servant in taking in the sacks, the corn merchant would be answerable for the injury. (d) And it is not enough that the servant injured, and the servant causing the injury, should be servants of the same master: they must be employed in the same work; for if a gentleman's coachman was to drive over his gamekeeper, the master would be just as responsible as if the coachman had driven over a stranger. (e) Nor is it sufficient that they are temporarily subject to the same superintendent, if they are not in fact the servants of the same master. (f) If a fellow-workman in a mine is also a co-proprietor in the mine, and therefore one of the plaintiff's masters, the common master is then responsible for injury caused by the negligence of such fellow-workman. (g) But a certificated manager of a mine is a fellow-servant with the miners. (h) A foreman is a servant as much as the other servants, whose work he superintends. (hh) A sub-contractor and his servants engaged in doing the common work of a particular contract, under a contractor, are all fellow-servants, engaged in one common employment, and they all are held to undertake, as between themselves and the contractor, to run all the ordinary known risks of the service, including the risk of negligence of the other servants. (i) So a carpenter in the service of a railway company cannot sue the company for the negligence of a porter in their employ. (k)

There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from a negligence of one is so much a natural and necessary consequence of the employment of which the other accepts, that it must be

(c) *Lovegrove v. Lond. & Brighton Ry.*, 33 L. J. C. P. 329.

(d) *Abraham v. Reynolds*, 5 H. & N. 149; *Waller v. S. E. Ry. Co.*, 32 Law J. Exch. 205.

(e) *Ld. Cranworth, Bartons Hill Coal Co. v. Reid*, 3 Macq. 294, 307.

(f) *Warburton v. Gt. West. Ry.*, L. R. 2 Exch. 30.

(g) *Ashworth v. Stanwix*, 30 Law J. Q. B. 183.

(h) *Howells v. Landore Steel Co., L. R.* 10 Q. B. 62.

(hh) See *Wilson v. Merry*, *ante*, p. * 445.

(i) *Wiggett v. Fox*, 11 Exch. 832; 25 Law J. Exch. 193.

(k) *Morgan v. Vale of Neath Ry.*, *inf.*

included in the risks which are considered in his wages. Thus whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of a railway, risk of injury from the carelessness of those managing the traffic is one of the risks necessarily and naturally incident to such an employment, and is within the rule. (*l*)

[* 447] * This must now be understood subject to the Employer's Liability Act, 1880, (*m*) which renders the masters in some cases liable for injuries caused by defects or by the negligence of a workman having superintendence. The amount of compensation recoverable is limited, (*n*) and the action is to be brought in the first instance in the county court (*o*), and notice of the injury given in writing. (*p*)

Injuries to Volunteers who assist gratuitously in Work of a Dangerous Nature. — If a person comes forward as a volunteer, and offers to assist servants engaged in a difficult or dangerous work, and the volunteer gets injured through the negligence of one of the servants, the employer is not responsible for the injury; for a person by volunteering his services cannot have any greater rights or impose any greater duties on the employer, than would have existed if he had been a hired servant. (*q*)

A foreman is a servant, as much as the other servants, whose work he superintends.

Duties of the Servant. — Every servant, on the other hand, impliedly undertakes to obey the just and reasonable commands of the master, and to be careful, diligent, and industrious in the performance of the work intrusted to him to execute. A servant who professes to be capable of undertaking an office of skill impliedly represents himself to be possessed of the skill requisite for the due discharge of the functions of the office; and if he does not possess that skill, or if, possessing it, he fails

(*l*) *Morgan v. Vale of Neath Ry. Co.*, 1 L. R. 1 Q. B. 149; 5 B. & S. 580; 33 L. J. Q. B. 265.

(*m*) 43 & 44 Vict. c. 42.

(*n*) S. 3.

(*o*) S. 6.

(*p*) S. 4; see *Moyle v. Jenkins*, 8 Q. B. D. 112; *Keen v. Millwall Co.*, 8 Q. B. D. 482; *Stone v. Hyde*, 9 Q. B. D.

76; *Clarkson v. Musgrave*, 9 Q. B. D. 386. As to who is in charge of "a train upon a railway," see *Cox v. Gt. West. Ry. Co.*, 9 Q. B. D. 106. As to workman contracting himself out of the act, see *Griffiths v. Earl Dudley*, *post*, p. *1138.

(*q*) *Degg v. Mid. Ry. Co.*, 1 H. & N. 773; 26 L. J. Exch. 173; *Potter v. Faulkner*, 1 B. & S. 800; 31 Law J. Q. B. 30.

to exercise it, he is responsible for a breach of contract. A servant in the service of a tradesman impliedly promises to do no act knowingly and wilfully which may injure his master's trade or undermine his business. He must not attempt to draw away his master's customers; but there is no law which prevents him from soliciting prospective custom from them at some future period when he hopes to be able to set up in business for himself. (r) His possession of the master's property is, as we have already seen, the master's possession. He has in contemplation of law the mere custody of it, so that if he is provided with a house or a lodging by the master, he may be turned out of it at any moment, without any notice to quit. (s)

Indemnification of the Master by the Servant.—If damages have been recovered from the master by reason of the servant's negligence in doing the master's work, or in executing his orders, * these damages may be recovered by the [*448] master from the servant, and the verdict and judgment in the action against the master are evidence of the amount of these damages, but not of the circumstances under which they were recovered. (t) If the captain of a ship engages in smuggling transactions, and thereby causes the ship to be forfeited and condemned, he is responsible in damages to the shipowner for causing the latter to lose his property. (u)

Dismissal of Skilled Servants for Incompetency.—If a laborer, servant, or artisan professes to be skilled in some particular art, craft, or mystery, and has been hired as a skilled servant, and is found to be utterly incompetent to do what he has expressly or impliedly undertaken to perform, the employer is not bound to go on employing him to the end of the term, but may at once dismiss him. (x)

Dismissal for Misconduct.—If a servant wilfully disobeys or habitually neglects the just and reasonable orders of the master; if he absents himself repeatedly from the service, or refuses to perform his work, or to submit to the domestic regulations of the house, or is guilty of gross moral misconduct, or of fraudulent

(r) *Nichol v. Martin*, 2 Esp. 734.(u) *Blewitt v. Hill*, 13 East, 12.(s) *Mayhew v. Suttle*, *ante*, p. * 266.(x) *Horton v. McMurtry*, 5 H. & N.(t) *Green v. New River Co.*, 4 T. R. 667; 29 L. J. Ex. 260.

misrepresentation and deceit in the discharge of his duties, to the injury of his employer, (*y*) the contract may be dissolved by the master, and the servant dismissed. The following instances of misconduct and disobedience have been held to warrant a dismissal of the servant and a dissolution of the contract by the master:—Being frequently absent and often sleeping out without leave; (*z*) pregnancy; (*a*) assaulting a fellow maid-servant with intent to ravish her; (*b*) refusing to work during the customary hours of labor; (*c*) habitually neglecting to perform the duties he had undertaken to discharge; (*d*) refusing to conform to the hour of dinner; (*e*) abusing and insulting the master, and disturbing the peace of his family; (*f*) trespassing unlawfully in game preserves, after having been cautioned and ordered not to enter them; (*g*) enticing away the master's servants; (*h*) becoming the father of a bastard; (*i*) seducing the master's maid-servant; repeatedly coming home intoxicated; (*k*) [*449] making fraudulent or grossly inaccurate * entries in account-books; (*l*) absence from the master's dwelling-house for a night to visit a sick mother against the will of the master, and after leave of absence had been asked for and refused; (*m*) the setting up of a claim inconsistent with the relation of master and servant, such as a claim to be a partner; (*n*) or the assertion of rights and privileges not warranted by the contract or the nature of the service, and injurious to the interests of the master. (*o*) And it is apprehended that the entertaining of guests at the master's expense, without his knowledge, and without any express or implied permission so to do, would be a good ground of dismissal. If a justifying cause for the dismissal exists, the master may avail himself of it as

(*y*) *Harmer v. Cornelius*, 5 C. B. N. s. 246; 28 L. J. C. P. 85.

(*z*) *Robinson v. Hindman*, 3 Esp. 235. As to pleading misconduct, see *Burgess v. Beaumont*, 7 M. & Gr. 962; *Lush v. Russell*, 5 Exch. 203.

(*a*) *R. v. Brampton*, Cald. 14, 16, 17.

(*b*) *Atkin v. Acton*, 4 C. & P. 208.

(*c*) *Lilley v. Elwin*, 11 Q. B. 742; 17 L. J. Q. B. 132.

(*d*) *Arding v. Lomax*, 24 L. J. Ex. 80.

(*e*) *Spain v. Arnott*, 2 Stark. 256.

(*f*) *Shaw v. Chairtie*, 3 C. & K. 25.

(*g*) *Read v. Dunsmore*, 9 C. & P. 588.

(*h*) *Lumley v. Gye*, 2 Ell. & Bl. 216;

see *Bowen v. Hall*, 6 Q. B. D. 333.

(*i*) *R. v. Welford*, Cald. 57.

(*k*) *Wise v. Wilson*, 1 C. & K. 662.

(*l*) *Baillie v. Kell*, 6 Sc. 379; 4 Bing. N. C. 638.

(*m*) *Turner v. Mason*, 14 M. & W. 112; 14 L. J. Ex. 311.

(*n*) *Amor v. Fearon*, 1 P. & D. 398.

(*o*) *Lacy v. Osbaldiston*, 8 C. & P. 80.

a defence to an action, although it may not have formed the ground of dismissal, and although the master may not have known of its existence at the time he discharged the servant. (*p*)

The following instances of misconduct and disobedience of orders have been held *not* to constitute a sufficient ground of dismissal and dissolution of the contract of hiring and service without notice: Temporary absence without leave, producing no serious inconvenience to the employer; (*q*) occasional insolence of manners and sulkiness; occasional disobedience in matters of trifling moment, such as neglecting to come on one or two occasions when the bell rang; stopping at one hotel when ordered to stop at another; (*r*) temporary absence on customary holidays, (*s*) or for the purpose of having a severe hurt attended to, (*t*) or for the purpose of procuring another situation, such absence being warranted by custom. (*u*)

Warning—Notice to Leave.—In the case of a yearly hiring, not made defeasible by custom or by the agreement of the parties, reasonable notice must be given on either side of the intention of determining the contract, which notice must expire with the current year of hiring, as in the case of a tenancy from year to year; but the same length of notice is not required in the case of a yearly hiring of a servant as is required in the case of a yearly hiring of land. A quarter's notice, given a quarter of a year before the expiration of the current year of hiring, would in all cases be amply sufficient; and a month's notice is often all that is required by custom and usage to determine the contract and entitle* the servant to [*450] leave. (*x*) So also an indefinite hiring is determinable by a reasonable notice in the absence of any agreement or custom to the contrary. (*y*)

Payment of Wages.—If the contract of hiring and service

(*p*) *Spotswood v. Barrow*, 5 Exch. 110; 19 L. J. Ex. 226.

(*q*) *Filliel v. Armstrong*, 7 Ad. & E. 557.

(*r*) *Callo v. Brouncker*, 4 C. & P. 518; *Cussons v. Skinner*, 11 M. & W. 161.

(*s*) *Reg. v. Stoke*, 5 Q. B. 303.

(*t*) *Chandler v. Grieves*, 2 H. Bl. 606 n.

(*u*) *R. v. Islip*, 1 Str. 423; *R. v. Polesworth*, 2 B. & Ald. 483.

(*x*) *Williams v. Byrne*, 7 Ad. & El. 177; *Browne v. Symons*, 8 C. B. N. S. 208.

(*y*) *Fairman v. Oakford*, 5 H. & N. 635; *Green v. Wright*, 1 C. P. D. 591.

leaves the amount of salary to be fixed by a third party, an application by the clerk or servant to such third party to fix the salary is a condition precedent to the liability of the employer. (z)

Disability from Sickness. — If a household servant hired for a year or any aliquot portion of a year, is hurt or temporarily disabled, or falls sick, whilst doing his master's business, the master is not entitled to make any deduction from the agreed wages for the time that the servant was incapacitated for the performance of his ordinary work; (a) but if he has been struck down with disease and permanently disabled, so that he can never be expected to return to his work, the contract of hiring is dissolved, and the master may dismiss him. (b)

Wrongful Dismissal. — If, after having taken the servant into his service, the master improperly dismisses him, or prevents him by a continued system of persecution from continuing in the service, he is bound to make compensation to the servant for all the damages sustained by the latter; for the law implies, from a person who contracts to pay a salary for services for a certain term, a contract to permit those services to be performed. (c) Formerly, in certain cases, where the servant had tendered his services, and had been ready and willing to do his work, but had been wrongfully prevented, such tender of service and readiness and willingness to serve were considered tantamount to actual service, and he has been allowed, after the term of service has expired, to recover as for work actually done, (d) upon the principle stated in the Roman law, and frequently relied upon by Continental jurists, that, whenever it has been agreed that one man shall do a certain act, and that another person shall pay a sum of money for the doing of it, and he who is to do the act is ready and offers to fulfil his engagement, but is prevented by the other, he has done that which is

(z) *Owen v. Bowen*, 4 C. & P. 93.

(a) *R. v. Sudbrooke*, 1 Smith, 59; *Chandler v. Grieves*, 2 H. Bl. 606, n.

(b) *Cuckson v. Stones*, Ell. & Ell. 248; 28 L. J. Q. B. 25.

(c) *Emmens v. Elderton*, *ante*, p. *434; so by the French law, "Si c'est par le fait du maître qui est le conducteur de ces services, qu'il ne les lui rend pas, le

maître doit payer au serviteur l'année entière de ces services; et il peut même être condamné aux dommages, et intérêts du domestique." — POTHIER, *Louage*, No. 173, 174.

(d) *Gandell v. Pontigny*, 4 Campb. 375; *Collins v. Price*, 2 M. & P. 239; 5 Bing. 132; *Smith v. Kingsford*, 3 Sc. 279.

equivalent to performance, and acquires a complete right to the money. (*e*) But now there *is no doubt [*451] that this doctrine of constructive service will not prevail; and it is now settled that if the servant is improperly dismissed, he ought not to keep himself in a state of readiness to serve during the residue of the term of hiring, but should endeavor to find another situation, and should sue on the special contract for the damage he has sustained by reason of the wrongful dismissal. (*f*) Where a traveller hired a courier to travel with him on the Continent from the 1st of June, 1852, and the traveller renounced the contract before the time arrived, declaring that he should not go abroad, and had no occasion for the courier's services, it was held that the courier was not bound to wait for the 1st of June and then tender his services, but that he might at once sue for the breach of contract. (*g*)

Of the Month's Wages in lieu of a Month's Warning. — When a defeasible yearly hiring has been dissolved by the dismissal of the servant without notice, the month's wages payable by custom (*ante*, * p. 437), are not, in contemplation of law, wages for services, but a sum to be paid as a compensation to the servant for being turned away without notice. (*h*)

Damages for a Wrongful Dismissal — Dissolution of the Contract — Wages pro rata. — Whenever one party has absolutely refused to perform his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to treat the contract as rescinded or abandoned, and sue on a *quantum meruit* for the work actually done. (*i*) If the party elects to treat the contract as a subsisting contract, and to sue for a breach of it, he

(*e*) 1 Dig. lib. 50, tit. 17, l. 161; 7 Eq. 550; *Ex parte* Logan, 9 Eq. Domat, lib. 1, tit. 1, sect. 4, xviii.; 149.
 Pothier, *Obligations*, No. 212; Holt, C. J., *Lancashire v. Killingworth*, 1 Ld. Raym. 687; *Smith v. Wilson*, 8 East, 443.

(*f*) Parke, B., *Emmens v. Alderton*, *ante* p. *434; *Fewings v. Tisdal*, 1 Exch. 295; *Erle, J., Goodman v. Pocock*, 15 Q. B. 583; *Yelland, Ex parte*, L. R. 4 Eq. 350; *Ex parte* Clarke, L. R.

(*g*) *Hochster v. De La Tour*, 2 Ell. & Bl. 678; 22 L. J. Q. B. 455; and see *Frost v. Knight*, L. R. 7 Ex. 111; 41 L. J. Ex. 78.

(*h*) *Fewings v. Tisdal*, 1 Exch. 295; 17 L. J. Ex. 19.

(*i*) *De Bernardy v. Harding*, 8 Exch. 822; *Prickett v. Badger*, 1 C. B. N. S. 305.

cannot afterward go on a *quantum meruit* as for an abandoned contract. If, for example, a servant hired by the year at yearly wages, payable quarterly, brings an action upon the contract, and recovers damages for a wrongful dismissal, he cannot afterward maintain an action for wages *pro rata* up to the time of his dismissal. The damages, therefore, in the action on the special contract should be assessed so as to include the wages up to the time of the dismissal. (*k*) When the contract is for a year's service, at wages payable yearly, the contract is entire and indivisible, and the servant or workman cannot recover from the employer wages *pro rata*, unless the contract has been [*452] rescinded or abandoned, or * has been put an end to by the exercise of a power of defeasance vested in the parties; so that if the servant dies in the middle of the year, his personal representatives will not be entitled to recover a proportionate part of the salary in respect of the time he actually served; (*l*) and if he is himself guilty of such misconduct as entitles the master to dissolve the contract and dismiss him from his service, he will lose all right to wages in respect of the portion of the year he has actually served. (*m*) But if the contract is put an end to by virtue of a power of defeasance vested in either of the parties by custom or by agreement, the wages are apportionable, and the servant must be paid *pro rata* up to the time of his departure. If, however, the contract is dissolved by mutual consent, and nothing is said of bygone services or wages not due at the time of the dissolution of the contract, no new contract arises by implication of law to pay wages *pro rata*. (*n*)

Amount of Wages recoverable — Deductions. — If the amount

(*k*) *Goodman v. Pocock*, 15 Q. B. 576; 19 L. J. Q. B. 410.

(*l*) *Countess of Plymouth v. Throgmorton*, Salk. 65; 3 Mod. 153; *Cutter v. Powell*, 6 T. R. 326.

(*m*) "Car riens est due tanque le fin de l'an, quod nota, et le contract est entier, et ne poet ester sever." Bro. Abr. fol. 57 (*Laborer*), pl. 48; ib. fol. 170, pl. 31; *Apportionment*, 26, pl. 13; Vin. Abr. (*Apportionment*), 8 & 9; *Spain v. Arnott*, 2 Stark. N. P. 256; *Huttman*

v. Boulnois, 2 C. & P. 512; *Turner v. Robinson*, 5 B. & Ad. 789; *Ridgway v. Hung. M. Co.*, 3 Ad. & E. 171; *Lilley v. Elwin*, 17 L. J. Q. B. 135; *Poth. Louage*, No. 174.

(*n*) *Lamburn v. Cruden*, 2 Sc. N. R. 534; 2 M. & Gr. 253; *Aliter*, if there was no hiring for a year, or the master sends the servant away; *Bailey v. Rim-mell*, 1 M. & W. 506; *Phillips v. Jones*, 1 Ad. & E. 333.

of wages to be paid has not been settled and agreed upon by the contract, there is an implied promise on the part of the employer to pay wages according to the customary and reasonable rate of remuneration. The master cannot deduct from wages money paid by him, to effect the servant's cure from a dangerous illness. (o) The wages in certain trades, moreover, cannot in general be lawfully paid otherwise than in the current coin of the realm (*post*, p. * 1167).

Presumption of Payment of Wages. — If a servant has left a considerable time without claiming wages, the presumption is that all the wages have been paid. (p) And if it is usual in the case of particular classes of servants and workmen to pay the wages weekly or monthly, and many weeks or months have elapsed without any claim or demand on the part of the servant, there is a *prima facie* presumption of payment. (q)

Jurisdiction of County Court and of Justices. — The acts empowering justices to deal with disputes between various sorts of servants and their master having been repealed by the Conspiracy * and Protection of Property Act, 1875 (r), [* 453] an act was passed in the same session, (s) giving power to county courts and justices to deal with them.

Breach of a Contract of Service involving Injury to others. — A wilful breach of contract to supply gas or water is subject to a penalty, and so is a wilful breach of any contract of service, the probable consequence of which will be to do injury to others or their property. (t)

Dissolution of the Contract by the Death of the Parties. — A contract of hiring and service is dissolved by the death of the

(o) *Sellen v. Norman*, 4 C. & P. 80.

(p) *Sellen v. Norman*, 4 C. & P. 81; *Evans v. Birch*, 3 Campb. 10; *Parke, B., Gough v. Findon*, 7 Exch. 50.

(q) *Abbott, C. J.*, 4 C. & P. 81, n.

(r) 38 & 39 Vict. c. 86, sect. 17.

(s) 38 & 39 Vict. c. 90; with respect to disputes with other sorts of servants, the following are some of the statutes relating to them: iron trade, 1 Anne, st. 2, c. 22, sect. 4; woolcombers and weavers, 12 Geo. I. c. 34 (part of sect.

2 is repealed, see 38 & 39 Vict. c. 86, sect. 17); cutlers, 57 Geo. III., c. 115; colliers, 57 Geo. III. c. 122; dyers, hat-makers, &c., 22 Geo. II. c. 27; bargees, &c., on Thames, 2 & 3 Vict. c. 71, sect. 37; clothiers and weavers, 30 Geo. II. c. 12; on the interpretation of the statute, see the cases of *Warburton v. Heyworth*, 6 Q. B. D. 1; *Grainger v. Ainsley*, 6 Q. B. D. 182.

(t) 38 & 39 Vict. c. 86, sects. 4, 5.

master or servant. (*u*) If the contract is made with a firm in partnership to serve the firm for a certain term, the contract is dissolved by the death of one of the partners. (*x*)

Seamen's Wages.¹ — By the 17 & 18 Vict. c. 104, amended by 43 & 44 Vict. c. 16, a summary remedy is provided for the recovery of seamen's wages which are not to be dependent on the ship's earning freight, and in case of the death of the seaman, are to be apportioned and paid in manner therein provided (sects. 181–204). (*y*) The master is liable, the ship is liable, and the owner is liable for the mariner's wages. (*z*) When seamen enter into articles to serve for a voyage or for a certain term, a contract by the master to pay increased wages for the services they are by the articles bound to render, is nugatory and void. (*a*) A seaman's contract of service may be terminated either by final abandonment of the ship, or by discharge given by the master. (*b*) By the Merchant Shipping Act, 1876, (*c*) in every contract of service between the owner of a ship and the master or any seaman, and in every instrument of apprenticeship, there is to be implied an obligation on the owner and master, that the owner, master, and agents, and every agent, shall use all reasonable means to insure the seaworthiness of the ship.

Of Contracts of Apprenticeship.² — When the employer exercises some trade, craft, or mystery, and it is made a term of the

¹ For the legislative provisions respecting seamen, see U. S. Rev. St. (2d ed. 1878) tit. 53, particularly c. 2, Shipment; c. 3, Wages and effects; c. 4, Discharge; c. 5, Protection and relief; also schedule annexed to c. 7, at p. 894. For the decisions upon the various sections of this title, see Desty, Commerce and Navigation, 142–196, and for a fuller statement of the same, Abb. Nat. Dig. tit. *Seamen*. See further, Desty, Shipp. & Adm., particularly c. 8, Seamen; 2 Pars. Shipp. & Adm., particularly c. 15, Of the seamen; 1 Pars. Contr., c. 19, sect. 3, p. 389; 1 Schouler, Pers. Prop. 400; 1 Story, Contr. sects. 185–199.

² As to the contract of apprenticeship, see Wood, Mast. & S., c. 2; Schouler, Dom. Rel. (3d ed. 1882) sects. 457, 487; also 335; Reeve, Dom. Rel. 341–345; Tyler, Inf. & Cov. (2d ed. 1882) sects. 97–106; U. S. Dig. tit. *Apprentices*.

Recent cases: On the validity and sufficiency of indentures of apprenticeship.

(*u*) *Farrow v. Wilson*, L. R. 4 C. P. 714; 38 L. J. C. P. 326.

(*v*) *Tasker v. Shepherd*, 6 H. & N. 575; 30 L. J. Ex. 207.

(*y*) See also the 24 Vict. c. 10, and the 25 & 26 Vict. c. 63, sect. 18, *et seq.*

(*z*) *The Stephen Wright*, 12 Jur. 732.

(*a*) *Ante*, p. *4; *Harris v. Carter*, 23 L. J. Q. B. 295.

(*b*) *The Warrior*, 1 Lush. 476.

(*c*) 39 & 40 Vict. c. 80, sect. 5; see *Thompson v. Farrer*, 9 Q. B. D. 372.

contract that he shall teach as well as employ and remunerate the servant for some specific period in return for the service rendered, the *contract amounts to an apprenticeship, a term derived from the French word *apprendre*, to learn. Every contract to serve on the one hand, and to employ and teach or instruct on the other, amounts to a contract of apprenticeship, and must be duly stamped. (d) If there is an engagement on the part of the servant to serve and to learn, but no express or implied engagement on the part of the employer to *teach*, so that no action can be maintained upon the contract against the latter for neglecting to teach, the contract is a contract of hiring and service only, and not a contract of apprenticeship. (e) It is not necessary that the words "to learn" and "to teach" should be used by the parties in framing their contract; for an agreement to take and maintain a person "after the manner of an apprentice" will constitute an apprenticeship. Nor need the word "apprentice" be used; for wherever it appears to have been the intention of the parties that the one was to teach and the other to learn, the contract will be a contract of

McKimmey v. McKimmey, 52 Ala. 102; Cockran v. State, 46 Ala. 714; Owen v. State, 48 Ala. 328; Cannon v. Stuart, 3 Houst. 223; State v. Hooper, 1 Houst. Crim. 17; Ballenger v. McLain, 54 Ga. 159; Ford v. McVay, 55 Ill. 119; Hunsucker v. Elmore, 54 Ind. 209; Doane v. Covell, 56 Me. 527; Fisher v. Lunger, 33 N. J. L. 100; People v. Hoster, 14 Abb. Pr. N. S. 414; People v. New York Juvenile Asylum, 2 Thomp. & C. 475; Commonwealth v. Atkinson, 8 Phila. 375.

On the power and duty to bind out children as apprentices (Owen v. State, 48 Ala. 328; Mitchell v. McElvin, 45 Ga. 558; Howry v. Calloway, 48 Miss. 587; People v. Weissenbach, 60 N. Y. 385; People v. Hoster, 14 Abb. Pr. N. S. 414; People v. New York Juvenile Asylum, 2 Thomp. & C. 475; Spears v. Snell, 74 N. C. 210; Timmins v. Lacy, 30 Tex. 115); to the Shakers (People v. Gates, 43 N. Y. 40). The apprenticing of a negro must not infringe the U. S. Civil Rights statutes. Matter of Turner, 1 Abb. Pr. N. S. 84.

As to assignment of indentures of apprenticeship. Biggs v. Harris, 64 N. C. 413. But the father's right to his child's services is assignable. Ford v. McVay, 55 Ill. 119. What is an apprentice's residence. Maddox v. State, 32 Ind. 111. Reasonableness of master's requirements. McPeck v. Moore, 51 Vt. 269. The relation is dissolved by the apprentice's enlistment. Johnson v. Dodd, 56 N. Y. 76. Apprentice's right to maintain action against his master for breach of indentures. Cann v. Williams, 3 Houst. 78; Kuhlman v. Blow, 31 Tex. 628. Master's rights against an absconding apprentice, and those aiding or harboring him, see State v. Hooper, 1 Houst. Crim. 17; State v. Owens, ib. 72; Bardwell v. Purring-ton, 107 Mass. 419.

(d) R. v. Nether Knutsford, 1 B. & Ad. 726.

(e) R. v. Shinfield, 14 East, 541; R. v. Burbach, 1 M. & S. 370.

apprenticeship, whatever may be the words used to express that intention. (*f*) As the contract is always made to last for more than one year, it must be authenticated by writing, signed by the party to be charged therewith (*ante*, p. * 170). By the 5 Eliz. c. 4, sect. 25 (repealed), the binding of an apprentice for the purpose of exercising trades was required to be made by indenture; but now, by the 54 Geo. III. c. 96, sect. 2, it is enacted that it shall be lawful for any person to take or retain or become an apprentice, though not according to the 25th, 30th, and 41st sections of the statute of Elizabeth, and that indentures, deeds, and agreements in writing entered into for that purpose, which would be otherwise invalid and ineffectual, shall be valid and effectual; but it is provided that the enactment shall not affect the immemorial customs of towns or by-laws of corporations. It is essential to the validity of the contract that the consideration or premium be duly set forth upon the face of the instrument, in order that the proper amount of stamp duty may be secured thereon. (*g*) An indenture apprenticeship is sufficiently executed by the apprentice desiring a bystander to write his name for him opposite the seal, and by his then taking the deed and delivering it to his master. (*h*)

Rights and Liabilities of Parties to Indentures of Apprenticeship. — An infant above the age of fourteen, and unmarried, is by the custom of London responsible upon covenants contained in indentures of apprenticeship executed by him just the [* 455] same as if * he were of full age; (*i*) but he is by the common law, where the apprenticeship is not within the city of London, exempt from all liability *ex contractu*, by reason of his minority (*ante*, p. * 120). Therefore it is that his friends ordinarily become bound for his faithful service and good conduct during the period of the apprenticeship. The parties who covenant for the continued service and good conduct of an infant apprentice are not responsible upon their covenants for trifling and pardonable instances of misconduct, such as staying out on Sunday evenings half an hour beyond the time

(*f*) *R. v. Wishford*, 5 N. & M. 540.

(*h*) *R. v. Longnor*, 4 B. & Ad. 649.

(*g*) *R. v. Keynsham*, 5 East, 311; (*i*) *Burton v. Palmer*, 2 Bulstr. Westlake v. Adams, 5 C. B. N. s. 248; 192.
27 L. J. C. P. 271.

allowed, (*k*) or for temporary absence and disobedience of orders, unattended by substantial injury to the master. But for all gross misconduct, and repeated or lengthened absence producing substantial injury to the master, they will be held responsible; and if an infant apprentice who has executed indentures of apprenticeship avoids the contract on his coming of age, and refuses to continue in the service of his master, they are bound to make good whatever damage is sustained by the latter by reason of such repudiation of the contract. (*l*) The sickness of the apprentice, or his incapacity to serve and to learn by reason of ill-health or an accident, does not discharge the master from his covenant to provide for him and to maintain him, inasmuch as the latter takes him for better and for worse, and must minister to his necessities in sickness as well as in health. (*m*) If the master has covenanted to teach three trades, and ceases to carry on one of them, he is guilty of a breach of contract, and the apprentice may, if he pleases, refuse to continue to serve. (*n*)

Profits acquired by a servant or apprentice in the course of or in connection with his service belong to the master. Where the apprentice of a waterman had been impressed and put on board a Queen's ship, where he earned two tickets, it was held that the tickets belonged to the master. (*o*)

Where the contract is silent as to the place where the trade is to be carried on, it has been held that the apprentice is bound to follow his master wherever his trade is set up. (*p*)

Misconduct of the Apprentice — Dissolution of the Contract.— The same amount of misconduct which, in the case of a contract of hiring and service, would authorize the master to dissolve the contract and discharge the servant, will not release him from liability upon his covenant in an indenture of apprenticeship, (*q*) * unless the contract in express terms gives the [* 456] master power to dismiss the apprentice. (*r*) But if the

(*k*) *Wright v. Gihon*, 3 C. & P. 583.

(*l*) *Cuming v. Hill*, 3 B. & Ald. 59.

(*m*) *R. v. Hales Owen*, 1 Str. 99; Reg. v. Smith, 8 C. & P. 153.

(*n*) *Ellen v. Topp*, 6 Exch. 424; 20 L. J. Ex. 241.

(*o*) *Barber v. Dennis*, 6 Mod. 69; Q. B. 224. Anon. 12 Mod. 415.

(*p*) *Royce v. Charlton*, 8 Q. B. D. 1.

(*q*) *Winston v. Lynn*, 2 D. & R. 475;

1 B. & C. 460; *Wise v. Wilson*, 1 C. & K. 669; *Phillips v. Clift*, 4 H. & N. 168; 28 L. J. Ex. 153.

(*r*) *Westwick v. Theodor*, L. R. 10

apprentice is guilty of such an amount of misconduct as renders it impracticable for the master to maintain, employ, and teach him, according to the terms of the indentures, the master cannot be sued for neglecting to perform his covenants in that behalf, inasmuch as the capability and willingness of the apprentice to be instructed, maintained, and provided for by the master are naturally conditions precedent to the liability of the latter upon such covenants. (s) If the apprentice deserts the master's service and enlists in the army, or contracts another relation which disables him from lawfully returning to his master, the latter is not bound to receive him back and instruct him if he returns. (t) "By the custom of London it is a sufficient cause for a master to turn away his apprentice if he frequents gaming houses," although gaming may not be expressly prohibited by the indentures. (u) If the fulfilment of the contract has not been prevented by the wrongful act of the master, the latter is not bound to refund any portion of the premium he has received. (x) The indentures of apprenticeship of an infant apprentice may be avoided by the infant, so far as regards his own personal liability on the contract, on his coming of age; and the master must trust for the continuance of the service thereunder to the covenants of those who engage for the infant, unless the binding is under the authority of an act of parliament. (y) The contract may also be dissolved by cancelling the indentures, or by giving them up with the consent of all parties *animo cancellandi*; likewise by the death of the master or of the apprentice, (z) or by the bankruptcy of the master. (a) If the master dies during the term, his representatives are not bound to return any part of the premium, as there is only a partial failure of consideration; (b) and if the apprentice becomes permanently ill, the covenant that he shall serve during the term is discharged. (c)

(s) *Mercer v. Whall*, 5 Q. B. 447-466; 14 L. J. Q. B. 267; *Rayment or Raymond v. Minton*, L. R. 1 Ex. 244; 35 L. J. Ex. 153; *Brown v. Banks*, 3 Giff. 190.

(t) *Hughes v. Humphreys*, 9 D. & R. 721; 6 B. & C. 680.

(u) *Woodroffe v. Farnham*, 2 Vern. 290.

(x) *Cuff v. Brown*, 5 Pr. 297.

(y) *Ex parte Davis*, 5 T. R. 715; *Ex parte Gill*, 7 East, 376.

(z) *Baxter v. Burfield*, 2 Str. 1266; 32 Geo. III. c. 57.

(a) 32 & 33 Vict. c. 71, sect. 33.

(b) *Whincup v. Hughes*, L. R. 6 C. P. 78; 40 L. J. C. P. 104.

(c) *Boast v. Firth*, L. R. 4 C. P. 1; 38 L. J. C. P. 1.

Discharge by Court of Summary Jurisdiction.—The court has the same powers in case of a dispute between a master and apprentice as in a case between employer and workman, and as if the instrument of apprenticeship were a contract between employer and workman, and may make an order directing the * apprentice to perform his duties, and if he neglects [*457] imprison him or rescind the instrument of apprenticeship, and order the whole or part of any premium to be repaid. (*d*)

Damages for refusing to employ, and for Wrongful Dismissal.—If a master or employer renounces the contract he has made with a workman or servant, and deprives him of the means of earning the stipulated remuneration, or refuses to take him into his employ, the jury, in assessing the damages, are justified in looking to all that has happened, or is likely to happen, to increase or mitigate the loss of the plaintiff down to the time of trial. (*e*) If an action is brought by a domestic servant for a dismissal without the customary month's notice, a month's wages are recoverable as the agreed damages (*ante*, pp. *436, *439—*451). If the contract is not defeasible by giving a month's notice, but is for a year's service, and the defendant is improperly discharged before the end of the year, he may recover for the work actually done by him up to the time of his dismissal, and for the damage he has sustained by being prevented from continuing his services and earning the stipulated hire. (*f*) The action may be brought as soon as the dismissal takes place; and the measure of damages is an indemnity to the plaintiff for the loss he sustains by the breach. If he has found other equally eligible employment, the damages would be small; but if not, they might far exceed the salary agreed to be paid. (*g*)

Damages against Apprentices.—Where an action was brought upon a covenant in an apprenticeship deed to recover damages for the loss of the services of the apprentice, it was held that damages were recoverable only up to the time of action brought,

(*d*) 38 & 39 Vict. c. 90, sect. 6, repealing 20 Geo. II. c. 19, sect. 4; *Finley v. Jowle*, 12 East, 248; *Re Gray*, 2 D. & L. 539.

(*e*) *Hochster v. De La Tour*, 22 L.

J. Q. B. 455; *Lake v. Campbell*, 4 Law T. R. N. S. 582.

(*f*) *Ante*, p. *451; *Cutter v. Powell*, 2 Smith's L. C. 20.

(*g*) *Emmens v. Elderton*, 4 H. L. C. 645.

as the contract continued in force, and the apprentice might still be compelled to serve. (*h*)

Title to Clothes by Hiring and Service. — Where the plaintiff had been hired as a servant by the defendant at thirty guineas a year and a suit of clothes, and had, on entering the service, been provided with the clothes, it was held that they did not become his property, and that he could not sue his master for detaining them until he had served a year. (*i*)

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* SECTION III.

PRINCIPAL AND AGENT.

Of Agencies and Commissions.¹ — Whenever one man undertakes the management of the business of another without hire or reward, and enters upon his task, the contract between the parties is, as we have before seen, a contract of mandate, or a gratuitous commission (*ante*, p. * 376). When the person employed is to be paid for his services, the contract is a contract for the letting and hiring of work and labor, care and attention, and belongs to the class *locatio operis faciendi* (*ante*, p. * 383). If the services of the party are hired for a term, the contract is a contract of hiring and service (*ante*, p. * 434). In either case the party employing is the principal, and the person employed the agent. If a commission-agent is engaged to sell goods for the principal, he paying him a certain sum per quarter, it does

¹ Upon the general principles of the law of agency, consult Story, Agency (9th ed.), c. 2, 3, 6; Wharton, Agency, c. 2, 3; 1 Pars. Contr. (6th ed.) c. 3; U. S. Dig. tit. *Principal and Agent*, sects. 1-346; article by S. Maxwell on Liability of a principal for usurious loans made by an agent; and on same subject, Payne v. Newcomb, 100 Ill. 611; article, 20 Alb. L. J. 464; 8 South. L. Rev. N. s. 107; article on the Liability of principal and agent upon bills and notes, 14 Alb. L. J. 409; 15 Alb. L. J. 117; article of Doctrine of imputed notice, &c. 6 Am. L. Reg. N. s. 1; article by F. L. Wells on Implied ratification of agent's acts, 13 West. Jur. 3; article by S. D. Thompson on Respondeat superior, 5 South. L. Rev. N. s. 233.

(*h*) Lewis v. Peachey, 1 H. & C. 518; 31 L. J. Ex. 496.

(*i*) Crocker v. Molyneux, 3 C. & P. 470.

not necessarily follow that there is a contract of hiring and service between the parties. (*a*)

In all cases where a person is either actually or constructively an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employer. (*b*) Thus interest made by an agent, by the use of his principal's money, belongs to the principal, (*c*) and not only interest, but every other sort of profit or advantage, clandestinely derived by an agent from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for. So that if an agent who has purchased goods according to order, sells them again to advantage with the view of appropriating the gain to himself, although he should have answered the loss if any, yet his employer is entitled to the profits. (*d*) Thus where the captain of a ship, in letting it to Government for six months, had stipulated with the Government officer by whom the ship was taken up, that a sum of money should be paid to him for his own benefit, in addition to the freight, it was held that the money belonged to the ship-owner. (*e*) So where the master of a ship in a foreign port claimed to retain for his own benefit the premium upon a bill drawn upon England on account of the ship on the ground that there had been a usage for masters of ships to appropriate such premiums to their own use, it was held that the money belonged * to the owner, and not to the captain. (*f*) [*459] Where an army agent and contractor, who had been employed by the plaintiff to provide a reasonable outfit for her son, debited the plaintiff with the full amount of the invoice prices charged by the tradesman supplying the outfit, though discount had been allowed him in each instance, it was held that the plaintiff was entitled to the discount. (*g*) Where the defendant represented to the plaintiff that he could procure him some shares in a company at £3 a share, and transferred certain shares

(*a*) *Butterfield v. Marler*, 3 C. & K. 163.

(*b*) Story on Agency, sect. 211.

(*c*) *Rogers v. Bochin*, 2 Esp. 702.

(*d*) Paley on Principal and Agents, p. 51.

(*e*) *Thompson v. Havelock*, 1 Campb. 527.

(*f*) *Diplock v. Blackburn*, 3 Campb. 43.

(*g*) *Turnbull v. Garden*, 38 L. J. Ch. 331.

to the plaintiff, and was paid £3 a share, and the plaintiff subsequently discovered that the defendant was himself the owner of the shares, and had lately purchased them for £2 a share, the defendant was ordered to pay back the difference in the price. (*h*) Where the plaintiff authorized the defendant, as his broker, to negotiate for the purchase of a ship, and the defendant, without the knowledge of the plaintiff, received £225 from the vendor out of the purchase-money, it was held that the plaintiff was entitled to recover the £225 from the defendant. (*i*) But where a ship-owner employed merchants to insure for him, and they charged him full premiums, but were allowed discount by the underwriters beyond brokerage, it was held that, as the allowance was usual, and the shipowner appeared to have accepted the terms, he could not afterward recover the discount. (*k*)

Revocation of Authority.¹— If no term of service has been expressly or impliedly agreed upon, the employer may at any time dispense with the future services of the agent, and revoke the authority delegated to him, so far as it relates to things to be done and remaining unexecuted. If a party is engaged as a “permanent attorney,” the word “permanent” does not confer any durable or special appointment as attorney, and the principal is not precluded from withdrawing the retainer; but if he is retained at a yearly salary, he is in general entitled to damages if he is dismissed before the end of the year. (*l*) Things actually done by the agent in the execution of his commission will, of course, be binding upon the principal; but the agent cannot, after his authority has been countermanded, enter, as between himself and the principal, into any fresh transaction. If the principal furnishes his agent with a sum of money, to be expended in the purchase of property, the principal may at any time, before the purchase is made and the money ex-

¹ As to revocation of agent's authority, see Story, Agency (9th ed.), c. 18; Wharton, Agency, c. 2, sects. 93–112; 1 Pars. Cont. (6th ed.) c. 3, sect. 8; U. S. Dig. tit. *Principal and Agent*, sects. 440–485; U. S. Ann. Dig. tit. *Principal and Agent*, I. Principal's death, see article, 19 Am. L. Reg. N. S. 401; and 39 Am. Dec. 81, note.

(*h*) *Kimber v. Barber*, L. R. 8 Ch. 56. and see *G. W. Ins. Co. v. Cunliffe*, L. R.

(*i*) *Morrison v. Thompson*, L. R. 9 Ch. 525.

Q. B. 480.

(*l*) *Emmens v. Elderton*, 13 C. B.

(*k*) *Baring v. Stanton*, 3 Ch. D. 502; 495; 4 H. L. C. 624.

pended, revoke the authority, and require the money to be repaid to him. (*m*) If goods are intrusted to a commission * agent for sale, the principal may, at any time [*460] before a sale has been made, require the goods to be returned to him; (*n*) and the agent has no right to sell contrary to the express directions or instructions of his employer, for the purpose of repaying himself his advances. (*o*) But the right to stop money intrusted to an agent to be paid to a third party, or to stop a sale, or revoke the orders or authority given, is always subject to this limitation, that the agent is merely an agent, and is not himself interested in or responsible for the payment of the money according to the directions he received when it was placed in his hands, (*p*) and has not done anything to render himself personally liable to the third party in consequence of the orders of the principal. (*q*) But mere advances made by a factor do not give him any rights in derogation of the right of the principal to give directions as to the time and manner of sale, unless such rights are conferred upon the factor by some express agreement, or by a known usage of trade. (*r*) If an agent agrees to act for a firm in partnership for a term of years, the contract is dissolved by the death of one of the partners during the term. (*s*)

When the Agent's Authority is irrevocable. — An authority coupled with an interest cannot be revoked. Where, therefore, a debtor handed to his creditor a power of attorney, authorizing him to sell certain lands of the debtor and pay the debt out of the proceeds of the sale, it was held that this power of attorney could not be revoked. (*t*)

Accounts.¹ — It is the duty of an agent to keep regular accounts

¹ On the duty of agents in keeping and rendering accounts, see Story, Agency (9th ed.), sects. 203, 332; Wharton, Agency, sect. 299; 1 Pars. Contr. 88; 2 Bouv.

(*m*) Fletcher v. Marshall, 15 M. & W. 763.

(*n*) Raleigh v. Atkinson, 6 M. & W. 670.

(*o*) Smart v. Sandars, 3 C. B. 380; 16 L. J. C. P. 39; Chinnock v. Sainsbury, 30 L. J. Ch. 409.

(*p*) Yates v. Hoppe, 9 C. B. 541.

(*q*) M'Ewen v. Woods, 11 Q. B. 13; 17 L. J. Q. B. 207.

(*r*) De Comas v. Prost, 2 Moo. P. C. N. s. 158.

(*s*) Tasker v. Shepherd, 6 H. & N. 575; 30 L. J. Ex. 207.

(*t*) Gausson v. Morton, 10 B. & C. 731; Clerk v. Laurie, 2 H. & N. 200.

and vouchers; (*u*) and if he refuses to account, after demand is made, he will be responsible in damages. (*x*) If goods have been intrusted to an agent to sell, and he renders no account of them, it will be presumed *prima facie*, that they have been sold, and the money received. (*y*) If an agent mixes up his principal's property with his own, he must show clearly what part of the property belongs to him; and if he fails in doing so, it will be treated as the property of the principal. (*z*) An agent who stands in a fiduciary relation to his principal cannot set up the statute of limitation in bar of a suit for an account by his principal. (*a*)

Liabilities of Brokers, Factors, and Commission-
[*461] **Agents, to their * Principals.**¹—All persons are brokers who contrive, make, and conclude bargains and contracts between merchants and tradesmen, for which they have a “fee or reward.” (*b*) Every broker and commission-agent who is employed to make purchases or to sell on behalf of his principal, impliedly promises to execute the commission intrusted to him in a careful, skilful, and diligent manner, and to obey the orders and directions he receives. If he is ordered to purchase an article of first-rate quality, and he buys an inferior commodity, he is guilty of a breach of contract, and is responsible to the principal in damages. (*c*) He is bound to exercise his judgment and discretion to the best advantage for the benefit of

Inst. 40; U. S. Dig. tit. *Principal and Agent*, sects. 669, 750, 1630. When bailiff or other agent is liable to action of account, and the nature of such action, 3 Bouv. Inst. 587–600. Duty of agents generally, and of particular classes of agents to account, 1 Wait, Act. & D. 252. Of broker, 3 Wait, Act. & D. 280; Dos Passos, Stockb. 686. Of factor, ib. 293. When broker must furnish itemized account. Dos Passos, Stockb. 122.

¹ See U. S. Dig. tit. *Principal and Agent*, II. Rights, duties, and liabilities of agents; IV. 1, Brokers; 3, Commission merchants; 4, Factors; Wharton, Agency, c. 4, Duties of agent to principal; c. 15, Brokers; c. 16, Factors; Story, Agency (9th ed.), sects. 28, Brokers; 33, Factors; also 109–113, 131, 141–143, 398–411, 448; c. 8, Liability of agents to their principals; c. 9, Defences of agents against principals; 1 Pars. Contr. c. 4, Factors and brokers; Edw. Fact. & B. sects. 16, 31, 108, 119.

(*u*) Romilly, M. R., *Stainton v. The Carron Co.*, 24 Beav. 353.

(*x*) *Topham v. Braddick*, 1 Taunt. 575.

(*y*) *Hunter v. Welsh*, 1 Stark. 224.

(*z*) *Story's Eq. Jur.* sect. 468.

(*a*) *Burdick v. Garrick*, L. R. 5 Ch. 233.

(*b*) *Milford v. Hughes*, 16 M. & W. 177.

(*c*) *Mainwaring v. Brandon*, 2 Moore, 125.

his principal, to render just and true accounts, and to keep the property of his principal unmixed with his own property, or the property of other parties. (*d*) He has in general an implied authority to sell at such time and for such prices as he may, in the exercise of his discretion, think best for his employer; he may sell on credit, if it is customary so to do, or if he acts under a *del credere* commission; and he must account for the produce of all sales effected by him when called upon so to do. (*e*) He cannot himself become the purchaser of the property intrusted to him to sell, unless he deals for it with the principal, openly and fairly, "at arm's length," and after a full disclosure of everything he knows concerning it; (*f*) nor can he purchase his own goods for his principal. (*g*) Where an agent employed to sell land sold it to a company in which he was interested as a shareholder and director, it was held that he was entitled to no commission from his employer in respect of the sale. (*h*)

If money has been paid by a principal to his brokers to enable them to carry out a contract which he had authorized, and which, at the time of such payment, he believed them to have entered into on his account, whereas, in truth, the authorized contract had never been made, the principal may recover the money from the agents. (*i*)

A mere forwarding agent is not bound to see whether the quality of goods which he is employed to ship or to forward corresponds with a contract which he has been instrumental in negotiating. (*k*)

*** Liability of Principals to Brokers, Factors, and [* 462] Agents.¹** — The principal is not bound by the unau-

¹ See Story, Agency (9th ed.), c. 13, Rights of agents in regard to their principals; U. S. Dig. tit. *Principal and Agent*, III. Rights, duties, and liabilities of principals; Wharton, agency, c. 5, Duties of principal to agent; 1 Pars. Contr. c. 3, sect. 13; Edw. Fact. & B. sects. 7-15; Lewis, Stocks, 107.

(*d*) Clarke v. Tipping, 9 Beav. 284; (g) Bentley v. Craven, 18 Beav. 76.
Thom v. Bigland, 8 Exch. 725; Gray v. (h) Salomans v. Pender, 3 H. & C.
Haig, 20 Beav. 238. 639; 34 L. J. Ex. 95.

(e) Crosskey v. Mills, 1 C. M. & R. (i) Bostock v. Jardine, 3 H. & C.
298; Boorman v. Brown, 3 Q. B. 515, 700; 34 L. J. Ex. 142.
527; Boden v. French, 10 C. B. 886.

(f) Murphy v. O'Shea, 2 Jones & Lat. (k) Zuilchenbart v. Alexander, 1 B.
& S. 234; 29 L. J. Q. B. 236; 30 ib.
422. Trevelyan v. Charter, 9 Beav. 140. Q. B. 254

thorized acts of his agent, but he is bound where the authority is pursued, or so far as it is distinctly pursued. But the question may often arise whether, in fact, the agent has exceeded what may be deemed the substance of his authority. Thus, if a man should authorize an agent to buy one hundred bales of cotton for him, and he should buy fifty for him at one time of one person, and fifty at another of a different person, or if he should buy fifty only, being unable to purchase more at any price, or at the price limited, the question would arise whether the authority was well executed. In general it might be answered that it was, because, in such a case, it would ordinarily be implied that the purchase might be made at different times of different persons, or that it might be made of a part only, if the whole could not be bought at all, or not within the limits prescribed. (*l*) Thus, where a principal gave an order to his agent to purchase one hundred bales of cotton, and he purchased ninety-four, that being all he could purchase, exercising all diligence, it was held that he had fulfilled his contract. (*m*) And where the principal ordered five hundred tons of sugars, and the agent could only get, from several different persons, four hundred tons, it was held that the principal was bound to accept the four hundred tons. (*n*) The question is one of the interpretation of the contract limiting the authority of the agent. The agent is bound to use due diligence to fulfil his duty or authority given to him. (*o*)

Del Credere Commissions.¹ — When the agent, in consideration of an additional commission, guarantees to his principal the payment of all debts that become due through his agency to the principal, he is said to act under a *del credere* commission, a phrase derived from the Italian word *credere*, to trust. (*p*) Every person accepting and acting under a commission of this sort for the sale of goods makes himself responsible for the solvency of his vendees, and becomes absolutely liable to the prin-

¹ On *del credere* commissions, see Story, Agency (9th ed.), sects. 33, 112, 215, 234, 328; 1 Pars. Contr. 91, 95, 568 n.; Wharton, Agency, sects. 706, 784-786; Edw. Fact. & B., sect. 70; U. S. Dig. tit. *Principal and Agent*, sect. 1506.

(*l*) Story on Agency, sect. 170.

(*n*) Ireland v. Livingston, L. R. 5 H.

(*m*) Johnson v. Kershaw, L. R. 2 Ex. L. 395.

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(*o*) Ireland v. Livingston, *supra*.

(*p*) Grove v. Dubois, 1 T. R. 12.

principal for the payment of the price of the goods he sells. (*q*) Factors and commission-agents for sale, who receive and sell goods for foreign principals, or for parties residing at a distance, usually conduct their agency under a *del credere* commission, guaranteeing the solvency of the buyers or undertaking for the due payment of the price realized on sales effected by them. Their contract, however, is not a contract or promise, as we have seen (*ante*, p. * 168), to answer for the debt or * default of another within the meaning of the statute [* 463] of frauds, but an original independent contract, and only another form of selling goods. (*r*) Where a factor having a *del credere* commission has made advances to his principal, and has sold goods on account of the latter, he cannot, whether he has received the proceeds of the sale or not, recover from the principal so much of the advances as is covered by the price of the goods unless there is an express agreement between them, making the advances payable immediately, and postponing the time of payment of the price of the goods. (*s*) A person to whom goods are sent to be sold, and who is at liberty to sell them at any price he pleases, he paying a fixed price for them to the owner, is not an agent. (*t*)

Liabilities of Insurance-brokers to their Principals.¹— If an insurance-broker neglects to attend to the orders of his principal, or is guilty of misconduct and negligence in effecting an assurance, he will be responsible for all the damage that has been sustained by his employer, and may be clothed with all the responsibilities which would have devolved upon the underwriter, had the insurance been regularly effected. He may be compelled to pay to his principal the full sum ordered to be insured, or a total or average loss, as the case may be; but when

¹ See U. S. Dig. tit. *Principal and Agent*, sect. 1313; Bliss, L. Ins. c. 9; 2 Pars. Mar. Ins. c. 8; 2 Phillips, Ins. c. 23; Wood, F. Ins. c. 12; article on Insurance-brokers, 13 West. Jur. 489; Wharton, Agency, sects. 202, 704, 705, 710; Story, Agency (9th ed.), particularly sects. 58, 103, 109, 187, 190, 191, 203, 432, note; May, Ins. c. 5; Angell, F. & L. Ins. c. 23.

(*q*) Mackenzie v. Scott, 6 Bro. P. C. 291. (*s*) Graham v. Ackroyd, 10 Hare, 202.

(*r*) Couturier v. Hastie, 8 Exch. 40; (*t*) White, *ex parte*, L. R. 6 Ch. Wickham v. Wickham, 2 Kay & J. 397.
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he is proceeded against for losses by perils which he ought to have insured against, he is, of course, entitled to every benefit and objection which the underwriter himself could have taken advantage of if the assurance had been duly effected, such as fraud, deviation, non-compliance with warranties, or the like. (*u*) He is bound, moreover, to exercise a reasonable and proper amount of care, skill, and judgment in the execution of his duty. (*x*) If a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that the latter will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases; and although he has no effects, yet if the course of dealing between them be such that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless he receives notice to the contrary. If the merchant abroad sends bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire trans-
 [*464] action. (*y*) If the * broker finds that he is unable to effect an insurance upon the terms offered by the principal, it is his duty to give the latter notice of the fact. If he makes the insurance on terms different from those prescribed, he will be responsible to the principal. (*z*) But if insufficient orders are sent, and the agent or broker does all that is usual to get the insurance effected, that is sufficient. (*a*) The insurance-broker is agent for both parties: first, for the assured, in effecting the policy, and in everything that is to be done in consequence of it; then he is agent for the underwriter as to the premium, but for nothing else. If he neglects to pay the premium to the underwriter, the latter may maintain an action for its recovery, unless circumstances have occurred entitling the

(*u*) *Park v. Hammond*, 2 Marsh. 191; *Mallough v. Barber*, 4 Campb. 150; *Turpin v. Bilton*, 6 Sc. N. R. 447.

(*y*) *Smith v. Lascelles*, 2 T. R. 189; *Corlett v. Gordon*, 3 Campb. 472.
 (*z*) *Chapman v. Walton*, 10 Bing. 57; 3 M. & Sc. 389; *Cahill v. Dawson*, 26 L. J. C. P. 253.
 (*a*) *Smith v. Cologan*, 2 T. R. 188, n.

insured to a return of the premium, in which case it is the duty of the broker, if he has notice thereof, to retain the money and return it to the insurer. (b) If he has acted as the agent of the underwriter in paying the loss upon the policy, the payment by the broker is a payment by the underwriter himself. (c) It is the usage amongst merchants, insurance-brokers, and underwriters in the city of London, to set off the general balance of accounts between the broker and the underwriter, at the time of the loss, against the loss, and for the broker then to debit himself to that amount in his account with the assured, and the underwriter is then considered to be discharged of his debt to the assured; and when the assured is cognizant of this course of dealing, and assents to it, the passing of the accounts between the broker, the underwriter, and the assured, operates as a payment to the latter, and as an extinguishment of the underwriter's debt. (d) The broker now keeps two accounts with underwriters, called the credit and the cash accounts, into which the premiums received from the principals of the broker go, and the balance on which is due from the broker to the underwriter, and in no way from the individual assured, whose particular premium has gone into that account. (e) The authority given to a broker when he is to effect a policy of insurance does not extend to warrant him in cancelling it. (f)

Sharebrokers and Stockbrokers.¹—If a sharebroker, directed to buy shares, buys what is ordinarily bought and sold in the stock market as shares, he has fulfilled his commission, and cannot be made responsible for the fraud or misconduct of parties who may have issued the shares without authority. There is no warranty * or undertaking, either on the [*465] part of a broker employed to buy shares or scrip, or on

¹ See Dos Passos, Stockb. c. 3, 7, 10, 11; Biddle, Stockb. 75, 138, 388; Lewis Stocks, c. 3, 6, 7, 10, 11; Edw. Fact. & B. sects. 7-9, 109; Wharton, Agency, sect. 702; Story, Agency (9th ed.), notes to sects. 9, 186, 335, 371; U. S. Dig. tit. *Principal and Agent*, sects. 1350-1363.

(b) *Shee v. Clarkson*, 12 East, 507.

(c) *Edgar v. Bumstead*, 1 Campb. 410; *Jamieson v. Swainstone*, 2 ib. 547, n.

(d) *Stewart v. Aberdeen*, 4 M. & W. 211.

(e) As to broker's accounts, see *Beckwith v. Bullen*, 8 El. & Bl. 683; 27 L. J. Q. B. 162; and *Xenos v. Wickham*, 14 C. B. N. s. 460; 33 L. J. C. P. 19.

(f) *Xenos v. Wickham*, L. R. 2 H. L. 296; 36 L. J. C. P. 316.

the part of the principal who employs him, that the article, which merely passes through the broker's or the principal's hands, is anything more than what it purports on the face of it to be, and what it is generally understood to be in the market. (*g*) Every principal who employs a stockbroker or sharebroker to transact business for him in the stock or share market is bound by the rules of the Stock Exchange and the established mode of transacting business, whether he knew of the usage or not, (*h*) unless the rules are unreasonable. (*hh*) If a sharebroker sells pursuant to his authority, and the principal neglects to deliver the shares, and the broker is consequently obliged to buy other shares in the market, he is entitled to recover from his employer all the damages, costs, and expenses, besides the customary remuneration for his trouble and loss of time. (*i*) And generally, whenever the sharebroker has been compelled by the custom of the Stock Exchange to make good the default of the principal, he has a remedy over against the latter. Therefore, if he pays calls on shares which he has purchased for his principal, he may recover the amount from the latter. (*k*)

Solicitors¹ are, as we have already seen, bound, in common with all professional men, to act faithfully and diligently, and exercise a reasonable degree of care and skill in the conduct and management of the business intrusted to them to execute (*ante*, p. *407). Gifts and purchases by a solicitor from his client are, as we shall see (*post*, p. *1179), invalid, unless the confidential relationship has been determined as regards the particular transaction, and

¹ Upon the subject of attorneys at law in the United States, consult Weeks, Attorneys, particularly c. 10, Authority and powers of attorneys by virtue of their retainer; c. 11, Duties of attorneys towards clients; c. 12, Liability of attorneys to their clients; c. 13, Liability of clients to attorneys; Story, Agency (9th ed), sects. 24, 212, 217*b*, 331, 383; Wharton, Agency, c. 12; 1 Pars. Contr. 113; U. S. Dig. tit. *Attorney and Client*.

(*g*) *Lamert v. Heath*, 15 M. & W. 486; 15 L. J. Ex. 298; *Mitchell v. Newhall*, 15 M. & W. 308; 15 L. J. Ex. 292; *Westropp v. Solomon*, 8 C. B. 373.

(*h*) *Sutton v. Tatham*, 10 Ad. & E. 27; *Bowlby v. Bell*, 3 C. B. 284; *Pollock v. Stables*, 12 Q. B. 774; *Coles v. Bristowe*, L. R. 4 Ch. 3; *Nickalls v. Merry*, L. R. 7 H. L. 530; see, however, *ante*, p. *204. As to Stock Exchange Rules

not being binding upon outside creditors, see *Ex parte Saffery*, 3 Ap. Cas. 213; *Ex parte Grant*, 13 Ch. D. 667.

(*hh*) *Pearson v. Scott*, 9 Ch. D. 198, and *Robinson v. Mollett*, *ante*, p. *204.

(*i*) *Bayliffe v. Butterworth*, 1 Exch. 425.

(*k*) *Bayley v. Wilkins*, 7 C. B. 899; *Taylor v. Stray*, 2 C. B. N. S. 175; 26 L. J. C. P. 287.

some disinterested advice has been taken and acted upon by the client ; (*l*) but the validity of the purchase cannot be impeached by a stranger. (*m*) If a solicitor discontinues proceedings in an action which he has commenced by direction of his client, he is bound to show a reasonable and satisfactory ground for such discontinuance; and he must in general give due notice to his client of his intention to discontinue; and if he improperly throws up a cause, he has no right to be paid *pro rata* for his work and labor. (*n*) If a cause * which he is re- [* 466] tained to conduct fails through his negligence, he cannot recover from his client money expended by him subsequently to such negligence. "If he is not entitled to charge for his labor, he cannot charge for his money." (*o*) A solicitor is responsible to the client for all sums received by him in the conduct of the business intrusted to him, and must render a true and faithful account thereof when called upon so to do. Where, on a sale of real estate, the solicitor of the vendor receives the deposit as agent of the vendor, he has not, in the absence of any stipulation to that effect, any duty, like that of an auctioneer, to the vendee, but must pay it over to his principal, the vendor, on demand. (*p*) He is responsible also, as we have already seen, for the safe investment of all moneys intrusted to, and accepted by, him for investment (*ante*, p. * 379). But the town agent of a country solicitor is not responsible to the clients of the latter for money received whilst conducting their causes or legal proceedings. The privity of contract is solely between the town agent and his principal and employer, the country solicitor; he knows nothing of the clients of the latter, and is bound to account only to his principal. (See *post*, p. * 476.) But the court will, as before mentioned, sometimes interfere summarily for the protection of the client. The solicitor must, in general, one month before action against his client, deliver his bill of costs, signed by him, to his client; (*q*) and when his bill has been paid, he is bound

(*l*) *Holman v. Loynes*, 18 Jur. 839;
Simpson v. Lamb, 7 Ell. & Bl. 84; *Gibbs*
v. Daniel, 4 Giff. 1.

(*m*) *Knight v. Bowyer*, 26 L. J. Ch.
 769.

(*n*) *Nicholls v. Wilson*, 11 M. & W.
 106.

(*o*) *Lewis v. Samuel*, 8 Q. B. 685.

(*p*) *Edgell v. Day*, L. R. 1 C. P. 80;
 35 L. J. C. P. 7.

(*q*) *Phipps v. Daubney*, 16 Q. B. 514;
Smith v. Pococke, 22 L. J. Ch. 545.

to deliver up, if called upon, all papers and documents in his hands belonging to his client, in good order and properly arranged. (*r*)

Sheriff's Officers, expressly employed by a solicitor to execute process, may maintain an action against the latter for the recovery of such fees as are usually allowed on the taxation of costs by the course and practice of the courts, and are not bound to resort to the clients of the solicitor for remuneration. (*s*)

Duties of Estate and House-Agents.¹—A house-agent employed to procure a tenant for a house is bound to use due care and caution in the letting of the house, and to make all proper and necessary inquiries touching the respectability and solvency of the tenant. If, therefore, he lets the house to a notoriously insolvent person, or to one whom he knows to be insolvent, he will be responsible in damages to his employer. (*t*)

Receipt of Money and Goods by Agents on Account of their Principals.—It is a settled rule that an agent shall not, [*467] after *accounting with his principal and receiving money in his capacity of agent, afterward say that he did not do so, and did not receive it for the benefit of his principal, but for some other person, (*u*) unless there has been a mistake and a void payment *ab initio*, so that the money never was in truth received for the principal. But if the agent effects a contract of sale at a high price in consequence of a fraudulent misrepresentation made by him, and receives such price, but is afterward compelled to refund the money to the purchaser, the principal cannot maintain an action for money had and received against the agent, to recover the price, inasmuch as the sale is avoided by the fraud of the agent, and the money received under

¹ As to real-estate agents, see Fitch, Real-Estate Agency, particularly c. 2, Employment of the real-estate agent; c. 3, His authority; c. 6, His liability; Lynch, Real-Estate Brokers, particularly, c. 2, Authority of broker; c. 4, His duty; c. 5, His liability; c. 6, Liability of principal; U. S. Dig. tit. *Principal and Agent*, sect. 1328.

(*r*) North-West Ry. Co. v. Sharp, 18 30 L. J. Q. B. 362. As to commission, see *post*, p. * 472.

(*s*) Foster v. Blakelock, 8 D. & R. 48. (*u*) Dixon v. Hamond, 2 B. & Ald. 313; Hawes v. Watson, 2 B. & C. 540;

(*t*) Heys v. Tindall, 1 B. & S. 296; Edgell v. Day, 35 L. J. C. P. 7; L. R. 1 C. P. 80.

it becomes the property of the purchaser, and is not money had and received for the use of the principal. (x) And although an agent has received goods from his principal to hold on account of the latter, or although he has received goods from a third party, and has agreed to hold them for his principal, he may, under certain circumstances, set up a *jus tertii*. Thus, if an auctioneer has received goods for public sale from a person who is not the owner of them, and has no right to sell them, and the real owner intervenes and forbids the sale, or claims the money realized by the sale, the auctioneer may set up the title of such real owner against the claims of the fictitious owner from whom he received the goods. (y) But although in many cases a bailee may set up against a claim by his bailor the *jus tertii*, yet, if the bailee has accepted the bailment with full knowledge of an adverse claim, he cannot afterward set up the existence of such a claim as against the bailor. (z) So where a wharfinger received notice that goods deposited at his wharf were marked with a fraudulent imitation of a trade-mark, and that the owner of the trade-mark was about to apply to the Court of Chancery for an injunction to prevent the sale of the goods, and, after the injunction had been granted, but before the wharfinger had notice that it had been granted, he refused to deliver the goods to the owner, it was held that he was justified in such refusal. (a)

Where a managing owner of a ship, or "ship's husband," employed certain agents for general purposes, and amongst others to receive and pay moneys on account of the ship, and kept a general account with them, and also a separate account as managing owner or ship's husband of the ship's disbursements and earnings, and, in order to obtain the freight earned by the vessel *from the East India Company, it was [*468] necessary that a receipt signed by the managing owner, and by one or more of the other owners also, should be given for the money due, and, upon a receipt of this description, the agents received £2000, which was placed by them to the credit of the

(x) Parke, B., *Murray v. Mann*, 17 L. J. Ex. 256; 2 Exch. 541.

(z) *Ex parte Davies*, 19 Ch. D. 86.

(a) *Hunt v. Maniere*, 33 Beav. 157;

(y) *Biddle v. Bond*, 6 B. & S. 225; 34 L. J. Ch. 142.

34 L. J. Q. B. 137; *Hardman v. Wilcock*, 9 Bing. 382.

managing owner in his account with them, it was held that the money was received by the agents as agents of the managing owner, and that the transaction was in effect the same as if the other joint-owners and the managing owner had received the money, and it had been then handed over to the managing owner, who had then placed it in the hands of the agents, as his bankers, on his own account, and that the joint-owners could not treat the agents as their debtors. (b) But where the plaintiffs were owners of a ship, and one of them was ship's husband, and the latter instructed the defendant at Quebec to charter the vessel from thence to England, and the defendant effected a charter-party, making the freight payable to himself at Quebec, and received the freight, and claimed to retain it in liquidation of a debt due to him from such ship's husband, it was held that the contract between the ship's husband and the ship agent with respect to the management and chartering of the vessel was a contract which belonged to all the shipowners, and that the defendant was bound to pay over to them the money received under that contract. (c)

Receipt of Money by Sub-Agents.¹—Every agent is responsible for money received by a sub-agent employed by him for the purpose of receiving the money, whether the principal had, or had not, reason to suppose that there was any necessity for the employment of a sub-agent. Thus, if the customer of certain bankers hands them a bill, in order that they may receive the money due upon it, and they send the bill to their correspondents at a distant place, and the bill is presented by them, and the amount paid, the payment to the sub-agent employed by the bankers for the purpose of receiving the money is a payment to the bankers to whom the bill was delivered by the customer, and they are responsible to him for the money, although it never reaches their hands and is never passed by them to the credit of

¹ As to sub-agents, see Story, Agency (9th ed.), sects. 386-390, 201, 217 *a*, 490; Wharton, Agency, sects. 276-278, 308, 348, 571, 827; 1 Pars. Contr. 75, 82 note, 89; U. S. Dig. tit. *Principal and Agent*, sect. 584; article by C. C. Tiedeman, on the Liability of banks in making collections, for the acts of correspondents and notaries, 12 Cent. L. J. 149; *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289, and note by A. C. Freeman, *ib.* 307.

(b) *Sims v. Brittain*, 4 B. & Ad. 375.

(c) *Walshe v. Provan*, 8 Exch. 843.

the customer. (*d*) The sub-agent so employed to receive money is accountable only to the agent, his employer, and cannot be sued for the money by the principal. (*e*) But, if he is not strictly a sub-agent, as, for example, if he has received direct instructions from the principal, or is in * any respect [*469] the agent of the latter, he will be accountable accordingly. Thus, where a creditor employs a country solicitor to recover a debt, and the country solicitor employs a London solicitor to set the legal machinery in motion, and the debt is paid to the London solicitor, the latter is accountable to the client for the money, and cannot retain it in satisfaction and discharge of a debt due to him from his immediate employer, the country solicitor. (*f*)

Payment by one Agent to another Agent. — Where an agent who receives money for his principal pays it over to another agent of that principal, he is bound to pay it in such a way as shall enable the agent to perform his duty to his principal, *i. e.* he must pay in cash, and not merely settle it in account between that agent and himself; or if he does so settle it, he takes it on himself to show an authority from his principal, and that there was an account between the principal and that agent, on which the principal was indebted to the latter. (*g*)

Purchases by the Agent with the Money of the Principal. — The property of a principal intrusted to his factor or agent belongs to the principal, notwithstanding any change which the property may have undergone in point of form, and even though the agent may have mixed the proceeds with his own money. Where, therefore, a draft for money was intrusted to a broker to buy exchequer bills for his principal, and the broker received the money and purchased American securities with it, and absconded, and was taken on his way to America, and surrendered the securities to his principal, it was held that the principal was entitled to the securities so purchased as against the assignees of the

(*d*) *Mackersay v. Ramsays*, 9 Cl. & Fin. 845. *Hately, Ves. Jun.* 292; *Story, Agency*, sect. 203.

(*e*) *Ireland v. Thompson*, 4 C. B. 149; 17 L. J. C. P. 248; *Stephens v. Badcock*, 3 B. & Ad. 354; *Cartwright v.* (*f*) *Hanley v. Cassan*, 11 Jur. 1088; *Ex parte Edwards*, 8 Q. B. D. 262.

(*g*) *Alderson, B., ib.*

broker, who had become bankrupt. (*h*) But the rule does not apply where there is no fiduciary relation between the parties. (*i*)

Frauds by Agents on their Principals.— Agents are in a sense trustees, and they owe to their principals a similar duty to that which trustees owe to their *cestui que trust*. Therefore, when two agents concur in a fraud, both are liable in equity, although one of them only has the benefit of the fraud. Where two confidential agents of a partnership conspired together to obtain for themselves the shares of the partners at an undervalue by keeping the accounts of the firm fraudulently so as to conceal from the partners the true value of their shares, it was held that their misconduct might be treated as a breach of trust. (*k*)

An agent cannot, without the knowledge of his principal, be * allowed to make any profit out of the matter of his agency beyond his proper remuneration as agent; and this rule applies with peculiar stringency to the directors of joint-stock companies, who are the agent of the company for effecting the sales or purchases made by the company. (*l*)

Payment of Commission.¹— If the amount of commission is named by the principal in his letter of instruction to the agent, and the agent declares that it is quite inadequate, but nevertheless acts upon the instructions, he will be bound by the specified commission. If he accepts the retainer, he must take it in its entirety, and cannot adopt part and repudiate part, and sue for a reasonable remuneration for his services. (*m*) A commission-agent employed to negotiate a sale upon the terms that he is to be paid a commission on the amount of purchase-money, or on the happening of a certain event, will not be entitled to any commission until the purchase-money has been received or the

¹ As to the compensation of agents, see Story, Agency (9th ed.), sects. 326–334 & 348; Wharton, Agency, sects. 321–339, 615, 724; U. S. Dig. tit. *Principal and Agent*, sect. 500.

(*h*) Taylor v. Plumer, 3 M. & S. 562; (*k*) Walsham v. Stainton, 33 L. J. see *In re Hallett's Estate*, 13 Ch. D. 696; Ch. 68.

Harris v. Truman, 7 Q. B. D. 340; 9 Q. (*l*) Hay's case, L. R. 10 Ch. 593.

B. D. 264, C. A. (*m*) Moore v. Maxwell, 2 C. & K.

(*i*) New Zealand and Australian 554.

Land Co. v. Watson, 7 Q. B. D. 374.

event has happened, unless there has been fraudulent delay or wilful neglect on the part of the employer. (*n*) In the ordinary course of commercial dealings a compensation is impliedly understood to be due to every person who undertakes the duties and services of an agent, the amount being generally governed by the usage of trade; but parties who sell as mortgagees or trustees are not entitled to commission, in the absence of any express contract or agreement to pay them for their services (*ante*, p. * 387). Where a broker took an assignment of several cargoes in trust to sell on their arrival, and out of the proceeds to repay the amount of his advances, and some of the cargoes were received and sold by him under the power in the deed, whilst the rest were sold under an order made in a suit instituted by him to enforce his security, it was held that in the latter sales he was entitled to his ordinary commission, but not in the former, as he sold, as regarded them, as a trustee. (*o*) The fact that a party has agreed to sell goods on commission may be proved by oral evidence, though the terms as to the payment of such commission have been reduced into writing. (*p*) An authority to sell upon certain terms and for certain commission is revoked by the death of the principal before the authority has been acted upon and executed; and if the agent sells after the death of the principal, he will not be entitled to the agreed commission, unless the personal representative has renewed the authority with knowledge of the contract. (*q*) If the commission * is [* 471] to be paid on the "net proceeds," it is payable only on the actual sum which reaches the pocket of the principal after deducting all charges and expenses. (*r*)

Extra Work by Agents. — For all work done by the agent in discharge of his business as agent he is paid by his commission, and can make no extra charge; but for work done by order of the principal, beyond his duty as an agent, he is entitled to make an extra charge, provided the work was done under circumstances fairly giving rise to an inference that he was to receive an extra remuneration. (*s*)

(*n*) *Bull v. Price*, 5 M. & P. 2; 7 Bing. 237; *Alder v. Boyle*, 4 C. B. 635.

(*o*) *Arnold v. Garner*, 2 Ph. 231.

(*p*) *Whitfield v. Brand*, 16 M. & W.

(*q*) *Campanari v. Woodburn*, 15 C. B. 400; 24 L. J. C. P. 13.

(*r*) *Caine v. Horsfall*, 1 Exch. 519.

(*s*) *Marshall v. Parsons*, 9 C. & P. 658.

Rights of Shipbrokers to Commission.—Shipbrokers are usually entitled, by the custom and usage of trade, to £5 per cent commission upon the freight payable upon charter-parties obtained and entered into by their aid and exertions; and if the amount of freight is uncertain, they may, if they think fit, sue for a reasonable remuneration upon a *quantum meruit*. The right to the commission does not depend upon the fact of the ship's earning freight; and the claim is not liable to be cut down by the loss of the vessel, or her failure to get a cargo. (t) When a shipbroker has introduced the captain of a ship and a merchant to each other, and they by his means enter into some negotiation for a voyage, the broker is in general by usage of trade, entitled to his commission if a charter-party is effected between them for that voyage, even though they may employ another broker to prepare the charter-party, or may write the charter-party themselves. And if a broker, authorized by both parties, and acting as the agent of each, communicates to the merchant what the shipowner charges, and also communicates to the shipowner what the merchant will give, and he names the ship and the parties, so as to identify the transaction, and a charter-party is ultimately effected for that voyage, this broker is entitled to his commission; but if he does not mention the names, so as to identify the transaction, he does not get his commission to the exclusion of another broker who afterward introduces the parties personally to each other; for if the ship and the parties are not named, the brokers might change the ship, and put in another, pending the negotiation. (u)

Where a shipowner employed A, a shipbroker, to procure a charter for his ship, and A employed B, another broker, who procured the charter, evidence of a usage of trade was admitted to show that the second broker, who actually procured the [*472] charter, * was entitled to his commission from the shipowner. (x) But to render the shipowner responsible upon an implied contract with the second broker, it must be shown that the shipowner was cognizant of the employment of the latter, and knew, at the time he accepted the charter, that

(t) *Hill v. Kitching*, 3 C. B. 306.But see *Schmating v. Tomlinson*, 6(u) *Burnett v. Bouch*, 9 C. & P. 624.*Taunt.* 147; *Boulton v. Jones*, 2 H. & N.(x) *Smith v. Boucher*, 1 C. & K. 574. 564.

it had been obtained through his instrumentality. (*y*) A usage of trade cannot be given in evidence to impose on the party who has entered into the contract another and wholly different obligation, and to show that, because he has agreed to consign the ship to the charterer's agents on the outward voyage, he is therefore liable to pay the agent's commission on the homeward cargo. (*z*)

Right to Commission of Policy-Brokers.—By the 30 Vict. c. 23, sect. 16, the principal is not to be liable to pay the broker's commission upon effecting a policy of sea insurance, or any premium paid by the broker, unless the policy is duly stamped; and any sums so paid are to be deemed to have been paid without consideration, and are to remain the property of the principal.

Right to Commission of Travellers for Orders.—When a commission-agent, employed by a manufacturer to obtain orders, is to receive a commission "on all goods bought" by persons from whom he obtains orders, the commission is earned as soon as a valid bargain of purchase and sale has been made between the manufacturer and the purchaser introduced by such agent, whether the goods are at the time in existence or not in existence, and whether the contract is or is not ultimately carried into effect, and whether it turns out to be a bad bargain, productive of loss, or an advantageous transaction. (*a*)

Commission of House-agents, Estate-agents, and Auctioneers.¹

—If a man having a house or estate to sell or let, places it in the hands of several house-agents, with instructions to secure a purchaser or tenant, the successful agent is alone entitled to

¹ Upon a broker's right to commissions, see *Derrickson v. Quimby*, 43 N. J. L. 373; *McArthur v. Slauson*, 53 Wis. 41; *Watson v. Brooks*, 15 Cent. L. J. 308; *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Levy v. Loeb*, 85 N. Y. 365; *Gonzales v. Broad*, 57 Cal. 224; *Dolan v. Scanlan*, ib. 261; *Veazie v. Parker*, 72 Me. 443; *Harper v. Goodall*, 62 How. Pr. 288; *Potts v. Aechternacht*, 93 Pa. St. 138.

As to auctioneers, see *Story, Agency* (9th ed.), sects. 27, 107, 108, 140 note, 209; *Wharton, Agency*, c. 13; 1 *Pars. Contr.* 495, 520; 2 ib. 615, 628; U. S. Dig. tit. *Auction*, sect. 101.

(*y*) *Smith v. Boutcher*, 1 C. & K. 576.

(*z*) *Phillips v. Briard*, 1 H. & N. 27; 25 L. J. Ex. 233.

(*a*) *Lockwood v. Levick*, 8 C. B. N. S. 603; 29 L. J. C. P. 340.

commission, unless instructions have been given to the other house-agents to advertise the house, or render some particular or special services in the matter, entitling them by the custom of the trade to some remuneration. (*b*) But if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to his commission, although the actual sale was not effected by him. (*c*) Where A promised to pay B a sum of money if he would procure him a tenant at a certain rent, it was

held that B was entitled to the money as soon as a [*473] party introduced by him had been accepted * by A, and a binding agreement for the tenancy had been entered

into. (*d*) In a great number of instances house-agents go to a great deal of trouble on the terms that if they get no purchaser they shall have no claim; and if upon the contingencies which have happened nothing was to be paid, nothing can of course be recovered. (*e*) Where an auctioneer was employed to sell ground-rents by auction, on the terms of receiving 1 per cent commission on the sale, and, after he had advertised the sale, but before the day of sale, the employer sold the rents by private contract, it was held that a notorious custom in the trade, for the auctioneer to receive his full commission in such a case, might be engrafted upon the contract. (*f*) But the usage must be so universal that every one in the trade must be taken to know it. (*g*)

The Right of the Agent to be reimbursed upon the Revocation of his Authority depends upon the terms of the contract by which his services were retained, and the custom and usage of the trade in which he is engaged. When an agent is employed to sell or to let, on the terms that he is to be paid a certain percentage on the price or the rent, the general understanding is that he takes his chance of a large remuneration in case he finds a purchaser or a tenant, but gets nothing if he fails in so doing; but if trouble and expense have been properly incurred by the agent in endeavoring to carry into effect the instructions of the

(*b*) *Prickett v. Badger*, 1 C. B. N. s. 296; 26 L. J. C. P. 33.

(*c*) *Green v. Bartlett*, 14 C. B. N. s. 685.

(*d*) *Horford v. Wilson*, 1 Taunt. 15.

(*e*) *Green v. Mules*, 30 L. J. C. P. 343.

(*f*) *Rainy v. Vernon*, 9 C. & P. 559.

(*g*) *Wood v. Wood*, 1 ib. 60.

principal, and the latter revokes the authority, and prevents the agent from reaping the expected reward, the principal is bound to remunerate him for his trouble and expenses in the matter. (*h*)

Where an estate-agent, employed to sell at a given price, succeeds in finding a purchaser, but the principal then declines to sell, the agent is entitled to sue for a reasonable remuneration for his services; and the amount of his commission on the price would seem to be the sum to which he is fairly entitled. But if the authority is revoked before it is executed and a purchaser has been found, it does not follow that he is entitled to sue upon an implied contract for remuneration for his work and labor in endeavoring to find a purchaser or a tenant. (*i*) If it is the practice of house-agents to charge a fee for entering property to be let or sold in their register-book, and the employer has notice of this, or it is proved to be a known custom of the trade, the employer will be bound to pay this fee, although the authority may be revoked, or the agent may have failed to render any beneficial * service. This registration fee is all that the [* 474] house-agent is entitled to charge for ordinary services in the absence of any special instructions for advertisements. (*k*)

Where a public company employed a broker to dispose of their shares, on the terms that he should be paid £100 down, and £400 in addition upon the allotment of the whole of the shares of the company, and the broker disposed of a considerable number of shares when the company was wound up, it was held that the broker was prevented from earning the £400 by the act of the company, and was therefore entitled to sue them for damages. (*l*)

Lien of Factors and Brokers.¹ — Factors and brokers to whom goods are consigned to be sold have a lien for the general balance due to them from their employers or principals in the

¹ As to the lien of agents, especially factors, see Story, Agency (9th ed), c. 14; U. S. Dig. tit. *Principal and Agent*, sects. 546, 1537-1576; 1 Pars. Contr. 93: 2 ib. 743; 3 ib. 258; Wharton, Agency, sects. 766-777, and c. 18.

(*h*) *Simpson v. Lamb*, 17 C. B. 616.

(*k*) *Simpson v. Lamb*, 17 C. B.

296; 26 L. J. C. P. 33; *Campanari v.*

(*l*) *Inchbald v. Western Neilgherry*,
&c. Co. 17 C. B. N. s. 733; 34 L. J.
C. P. 15.

Woodburn, 15 C. B. 407; 24 L. J. C. P.
13.

ordinary course of their business as factors, and for their acceptances on behalf of such employers, upon the goods whilst they are in their possession, and on the moneys realized by the sale of them. (*m*) This right exists universally by the custom of the trade. It is part of the law merchant, and as such is judicially taken notice of by the courts, no proof being ever required as a matter of fact that such general lien exists. The lien does not extend to a collateral debt not growing out of the relationship of principal and factor, such as a debt due for rent, (*n*) nor to goods which have not actually reached the hands of the factor, (*o*) and come into his possession with the consent and direction of the owner; consequently, if goods have been left at the factor's place of business by mistake or inadvertence, (*p*) or have been taken possession of by him without the authority of the owner, he cannot set up a lien upon them for his balance. (*q*) And if the party from whom he receives the goods is only an agent he cannot retain them as against the true owner for a debt that was due to him from the agent at the time the goods were put into his hands, and which was not contracted on the credit of the deposit of the goods; but it is otherwise if he has made advances on the credit of the deposit, not knowing the depositor to be an agent. (*r*) The factor can only claim a lien for his general balance upon goods which come to his hands as factor. A factor, therefore, who effects a policy of insurance, not as factor, but as an insurance-broker, is not entitled to a general lien on a policy in his hands for a balance due to him in his character of factor. (*s*)

[*475] * **Lien of Packers.** — A packer is entitled to a general lien on the goods of his customer which are in his hands, (*t*) although they do not now so frequently make advances to their customers as they used to do. (*u*)

(*m*) *Kruger v. Wilcox*, Ambl. 252;
Hudson v. Granger, 5 B. & Ald. 31;
Hammond v. Barclay, 2 East, 227; *In re Pavy's Patent Felted Co.*, 1 Ch. D. 931.

(*n*) *Houghton v. Mathews*, 3 B. & P. 485.

(*o*) *Kinloch v. Craig*, 3 T. R. 123.

(*p*) *Lucas v. Dorrien*, 7 Taunt. 278.

(*q*) *Taylor v. Robinson*, 2 Moore, 730.

(*r*) *Pultney v. Keymer*, 3 Esp. 181.

(*s*) *Dixon v. Stansfield*, 10 C. B. 398.

(*t*) *Green v. Farmer*, 4 Bur. 2214; *Ex parte Deeze*, 1 Atk. 228.

(*u*) *In re Witt*, 2 Ch. D. 489.

Lien of Insurance-Brokers.¹ — Insurance-brokers have also, by the general usage and custom of trade, a lien for the general balance due to them from their employers upon all policies effected by them for such employers, and left in their hands, and upon all moneys received by them upon such policies from the underwriters, unless the party for whom they effected the policy was himself only an agent in the matter, in which case the extent of the lien will depend upon the disclosure or concealment of the agency, and the degree of credit they may have given to the agent, under the impression that he was the party really interested in the policy. The lien does not extend to a collateral debt not incurred in respect of brokerage business. If a policy-broker is employed by an agent, and there is no disclosure of the agency, and nothing to lead the broker to think that any third party is interested in the policy, and the assurance is accordingly effected in the name of the agent as owner, and a loss occurs, and the policy is allowed, after the loss, to remain in the broker's hands, and the latter then permits the agent to get into his debt, not knowing him to be an agent, the broker will have a lien as against the principal upon the policy, and upon the money he receives thereon from the underwriters, to the extent of the debt due to him from the agent as well as for his commission and charges for effecting the policy. (x) But if there is the slightest indication of the agency to the broker, such as a declaration by a British subject in time of war that the property is neutral, (y) or a statement that the assurance is to be effected "for a correspondent in the country," (z) or that the property to be insured belongs to a merchant abroad, who has consigned it to the agent with full power of disposition over it, and with authority to indorse the bill of lading, (a) the broker will have a lien only for his commission and charges for the insurance, and not for the balance due to him from the agent.

¹ As to the lien of an insurance-broker, see U. S. Dig. tit. *Principal and Agent*, sect. 1313; Story, *Agency* (9th ed.), sect. 379; 2 Phillips, *Ins.* 543-556; Wharton, *Agency*, sect. 707.

(x) Mann v. Forrester, 4 Campb. 61; (z) Snook v. Davidson, 2 Campb. Westwood v. Bell, ib. 355; Olive v. 218.
Smith, 5 Taunt. 56. (a) Lanyon v. Blanchard, ib. 597.

(y) Maauss v. Henderson, 1 East, 337.

Lien of Solicitors.¹—Solicitors also have a lien upon all money recovered by them in the actions and suits in which they are employed, and upon all the deeds and papers and other articles of their clients which come to their hands in their professional capacity, for the purposes of business, not only [*476] for the costs of the particular cause or matter with which such deeds or papers are connected, but for the costs due to them generally from their clients. (b) But the lien does not attach while the suit is still pending; and the parties may compromise the dispute and thus deprive the solicitor of his lien, if the compromise is *bona fide*. (c) By the 23 & 24 Vict. c. 127, sect. 28, the court may charge the client's property recovered or preserved (d) through the instrumentality (e) of the solicitor, with the payment of his costs. (f) If the solicitor discharges himself during the suit, he loses his lien, so far at any rate as relates to papers necessary for the successful prosecution of the suit; but it is otherwise if he is discharged by his client. (g) A solicitor has no lien upon the will of a client for the costs incurred in the preparation of it, and cannot therefore refuse to produce it after his client's death until his costs have been paid. And where deeds are delivered for a specific purpose, the right of lien is extinguished as soon as the particular purpose has been accomplished; and it may be superseded altogether by the attorney's taking from the client security for his costs. (h) A solicitor held the title-deeds of a mortgagor. He was also acting for the mortgagee, and continued to hold the deeds. The mortgagor

¹ As to the lien of an attorney at law, see U. S. Dig. tit. *Attorney and Client*, sects. 850-949; Weeks, *Attorneys at law*, sects. 368-384; Story, *Agency* (9th ed.), sect. 383; Wharton, *Agency*, sects. 615-630; 1 Pars. Contr. 116; 2 ib. 55; 3 ib. 269.

(b) *Stevenson v. Blakelock*, 1 M. & S. 535; *Lambert v. Buckmaster*, 2 B. & C. 616; *Blunden v. Desert*, 2 Dru. & W. 405; *Friswell v. King*, 15 Sim. 191; *Robins v. Goldingham*, L. R. 13 Eq. 440.

(c) *Morrison, Ex parte*, L. R. 4 Q. B. 153; s. c. *Sullivan v. Pearson*, 38 L. J. Q. B. 65; *Mercer v. Graves*, L. R. 7 Q. B. 499; 41 L. J. Q. B. 212.

(d) *Baile v. Baile, infra*; *The Heinrich*, L. R. 3 Ad. & E. 505.

(e) See *Twynam v. Porter*, L. R. 11 Eq. 181; *Heinrich v. Sutton*, L. R. 6 Ch. 865; *Re National Ins. Ass.*, L. R. 7 Ch. 221.

(f) *Berrie v. Howitt*, L. R. 9 Eq. 1; *Re Keane*, L. R. 12 Eq. 115; *Baile v. Baile*, L. R. 13 Eq. 497; *Jones v. Frost*, L. R. 7 Ch. 773.

(g) *Faithful, In re*, L. R. 6 Eq. 325.

(h) *Genges v. Genges*, 18 Ves. 294; *Balch v. Lymes*, Turn. & R. 92.

filed a petition for liquidation, and the solicitor acting for the trustee sold the equity of redemption and received the purchase-money. It was held that he had a lien upon it for costs due to him from the mortgagor. (i) A solicitor to a former trustee in a bankruptcy has a lien upon documents, the fruits of his own labor or expense, as against a new trustee. (k) A solicitor cannot set up the lien of his London agent on the papers of his client, against the claims of that client, the client having paid his solicitor's bill. (l) The town agent of a country solicitor has a lien only as against the client upon the money recovered, and upon the papers in his hands in the particular cause in which he is engaged, for the amount due to him by the solicitor in that particular cause. He cannot set up a claim of lien as against the client for the general balance due to him from the country solicitor who employs him, and cannot retain the money or papers of the client * to satisfy his general debt. (m) [*477] And his lien is limited to the debt actually due from the client to the country solicitor, so that if the country client pays the country solicitor, the lien is discharged, for the country solicitor can give the town agent no lien which he does not himself possess. (n) But the London solicitor has a general lien against the country solicitor upon any money recovered in an action, for all costs for agency business, and disbursements due from the country solicitor, whether in the particular action or in any other proceedings; but as between the London agent and the client the lien extends only to the costs of the particular action. (o)

A solicitor cannot set up a general lien for the balance due to him in respect of services not rendered by him as a solicitor; nor can he detain deeds and papers which do not come to him in his professional character. He has no lien, for example, where he acts or holds papers as town clerk, (p) or steward of a

(i) *In re Messenger*, 3 Ch. D. 317.

(k) *Ex parte Ralden*, 4 Ch. D. 129.

(l) *In re Andrew*, 30 L. J. Ex. 403.

(m) *White v. R. Ex. Ass. Co.*, 7 Moore, 249; *Moody v. Spencer*, 2 D. & R. 6; *Anon.*, 2 Dick. 802.

(n) *Waller v. Holmes*, 1 J. & H. 139; 30 L. J. Ch. 24; *Re Andrew*, 7 H. & N.

87; 30 L. J. Ex. 403; *Beatfield v. Barlow*, 38 L. J. Ch. 311; *Ex parte Edwards*, 8 Q. B. D. 262; C. A.; see *ante*, p. *708.

(o) *Lawrence v. Fletcher*, 1 Ch. D. 858.

(p) *Champernown v. Scott*, 6 Mad. 93.

manor; (q) he cannot set up any lien which is inconsistent with the nature of his employment, or the terms or conditions, or express or implied trust upon which he received the papers. (r) His right, moreover, is dependent upon the rights of his clients; and he cannot acquire more extensive powers over the papers in his hands than the client himself possessed at the time he deposited them with him. (s) If a solicitor transacts business for a firm in partnership collectively, and also manages the private business of the members of the firm individually, he has no lien upon the private securities, deeds, and writings of one partner in respect of the business done for the firm. (t)

A solicitor acting for mortgagee as well as mortgagor, thereby loses his lien on the deeds for costs due to him from the mortgagor, unless such lien is expressly reserved, even although the mortgagee may have known that the solicitor had such a lien. (u) Where the plaintiffs in a suit mortgaged their interest in the estate to the defendants with the sanction of the solicitor, and nothing was said about costs, it was held the solicitor's charge, under the 23 & 24 Vict. c. 127, s. 28 (*supra*), ought [* 478] not to be * postponed to the mortgage, as the defendants must have known of the rights of the solicitor. (v)

Lien of Shipmasters. — An agent cannot in general acquire a lien upon the property of his principal for work done by others whom he has employed and paid. But a shipmaster has a lien on the freight, not only for his wages, but for any expenditure which he may make in the ordinary discharge of his duties as master, and which is necessary for the performance of the voyage; (y) and where he makes a special contract, in itself *ultra vires*, in order to fulfil which he incurs special expenses, if the

(q) *Rex v. Sankey*, 5 Ad. & E. 428; *Molesworth v. Robbins*, 2 Jones & Lat. Newington Local Board v. Eldridge, 12 Ch. D. 349. 358.

(r) *Lawson v. Dickenson*, 8 Mod. 307; *W. 553; Turner v. Deane*, 3 Exch. 836; see *Re Faithful*, L. R. 6 Eq. 324; *Simmonds v. Great East. Ry. Co.*, L. R. 3 Ch. D. 797. 345.

(s) *Hollis v. Clarige*, 4 Taunt. 807; *In re Snell*, 6 Ch. D. 105. 495.

(t) *Esdaile v. Oxenham*, 3 B. & C. 229; *Faithful v. Ewen*, 7 Ch. D. 501. 60.

(y) *The Feronia*, L. R. 2 Adm. 65; *Lightfoot v. Keane*, 1 M. & W. 745; 37 L. J. Adm. 60.

owner adopts the benefit of that contract, he must also bear its burthens. Where therefore, the master of an ordinary seeking ship entered into a charter-party, under seal, to carry troops from the Mauritius to England, and stipulated, on his own responsibility, in the charter-party, that he would make certain alterations in the ship, in order to enable him to carry the troops, and at the Cape of Good Hope entered into another charter-party, not under seal, to a similar effect, and made the specified alterations, and paid money and drew bills to meet the expenses necessary to the making of these alterations, and the voyage was performed, it was held that, in equity, the master was first entitled out of the freight earned under these charter-parties, to be repaid the sums advanced, and to be indemnified against the bills, and that the owner (or his mortgagee) was only entitled to the net freight after deducting these charges. (z) At common law the master has a possessory lien on the cargo, not only for freight, but also for general average. (a) The captain of a ship or his agent has a lien upon the cargo which he has saved, for the expenses of doing so, although such expenditure was not with the owner's consent nor for the purpose of enabling the owner to earn freight, but for the purpose of saving the cargo. (b)

Lien of Ship's Husband. — The right of a ship's husband to be repaid out of the freight for advances made on account of the ship is a right of lien or retainer, and not in the nature of a charge on the freight; and, therefore, if he is removed from his office before he is in a position to receive the freight, an assignee of his interest cannot maintain a claim to it as against the owners. (c)

Lien of Shipwrights. — A shipwright has a lien on a ship in his dock where he is to be paid in ready money as soon as the *repairs are finished, and no credit is [*479] given, (d) and so has a contractor who agrees to furnish

(z) *Bristow v. Whitmore*, 9 H. L. C. 391.

(a) *Cleary v. M'Andrew*, 2 Moo. P. C. n. s. 216.

(b) *Hingston v. Wendt*, 1 Q. B. D. 367.

(c) *Benyon v. Godden*, 3 Ex. D. 263, C. A.

(d) *Raitt v. Mitchell*, 4 Campb. 146; *Franklin v. Hosier*, 4 B. & Ald. 341.

engines, &c., to a ship, and even if part of the price is paid, he retains his lien for the remainder. (*c*)

Indemnification of Agents.—The principal is bound to indemnify his agent in respect of all payments which may be made by the latter in the due course of his employment. (*f*) If the agent has necessarily incurred liabilities and expenses in following out his instructions *bona fide*, he may sue the principal upon an implied promise of indemnity; (*g*) but he cannot resort to the principal for an indemnity against the consequences of his own default, wrongful act, or want of skill and caution in the execution of his commission, (*h*) although a general indemnity against all charges and expenses he may be put to in executing his commission may have been given to him by his employer. (*i*) Nor is he entitled to be indemnified in respect of loss caused not by reason of his having entered into contracts which he was authorized to enter into by his principal, but by reason of his own insolvency. (*k*) If the agent, in the execution of his commission, has been compelled to pay money on behalf of the principal, he is entitled to recover the amount from the latter, whether the principal has or has not been relieved from liability by the payment. (*l*) If A employs B as a broker to buy shares in a company, according to the rules of the Stock Exchange, for a certain account day, and B in accordance with such rules pays for and takes a transfer of the shares on that day, A is bound to repay B the amount so paid, although before such account-day the company is being wound up under the 25 and 26 Vict. c. 89, sect. 153, which enacts that every transfer of shares shall then be void, unless the court otherwise orders. (*m*) By the Roman and Continental law, it is laid down

(*c*) *Ex parte* Willoughby, 16 Ch. D. 604.

(*f*) *Risbourg v. Bruckner*, 3 C. B. N. s. 823; 27 L. J. C. P. 90; *Taylor v. Stray*, 2 C. B. N. s. 175; *Westropp v. Solomon*, 8 C. B. 369; *Johnstone v. Usborne*, 11 Ad. & E. 549.

(*g*) *Adamson v. Jarvis*, 4 Bing. 71; 12 Moore, 241; *Betts v. Gibbins*, 2 Ad. & El. 57; 4 N. & M. 64; *Rawlings v. Bell*, 1 C. B. 960.

(*h*) *Toplis v. Grane*, 7 Sc. 641; *Farebrother v. Ansley*, 1 Campb. 347.

(*i*) *Ibbett v. De la Salle*, 30 L. J. Ex. 44.

(*k*) *Duncan v. Hill*, L. R. 8 Ex. 242; 42 L. J. Ex. 179.

(*l*) *Britain v. Lloyd*, 14 M. & W. 762; 15 L. J. Ex. 43; *Spurrier v. Elderton*, 5 Esp. 1; *Pettiman v. Keble*, 9 C. B. 701.

(*m*) *Chapman v. Shepherd*, L. R. 2 C. P. 228; 36 L. J. C. P. 113; *Biederman v. Stone*, 36 L. J. C. P. 198; L. R. 2 C. P. 504.

that there results from all agencies, mandates, and commissions, an implied contract on the part of the principal or employer to indemnify the agent for all his disbursements and expenses, and for all the liabilities incurred by him in the execution of his commission. (*n*)

* **Breach of Warranty of Authority by Agents.** —Where [* 480] an agent pretended to be authorized by a specified firm to purchase a ship on their behalf, and it turned out that he had no authority, and the shipowner was obliged to look out for another purchaser of the vessel, and lost £250 on the resale, it was held that the £250 was the measure of damage in an action against the agent for a breach of an implied undertaking or promise that the authority which he professed to have did in point of fact exist. (*o*) Where an agent pretended to be authorized to grant a lease, and it turned out that he had no such authority, it was held that the intended lessee was entitled to recover the value of the lease and all costs paid and incurred by him in endeavoring to enforce specific performance, down to the time when the agent disclosed the fact of his want of authority, but not the damages and costs arising out of the resale by the intended lessee of his lease. (*p*) So where the defendant, the joint owner of an estate, contracted, without authority from his co-owners, to sell it to the plaintiff, and on their failure to complete the sale the plaintiff sued them and failed, it was held that the plaintiff was entitled to recover from the defendant all costs up to the time when it appeared that the defendant had no such authority, as well as the expenses he had incurred in the investigation of the title, and the difference between the contract price and the market price of the estate, but not losses he had incurred on resale of stock bought for the purpose of stocking the land, as that was not shown to have been in the contemplation of the parties at the time of the sale. (*q*) If a man

(*n*) Dig. lib. 17, tit. 1. lex 12, sect. 9; Q. B. 215; Hughes v. Græme, *ante*, p. Poth. *Mandat*, No. 68-75; Domat, liv. * 65; Pow v. Davis, *ante*, p. * 65.

1, tit. 15, sect. 2. (*p*) Spedding v. Nevell, L. R. 4 C. P. 212; 38 L. J. C. P. 133; Godwin v. Francis, L. R. 5 C. P. 295; 39 L. J. C. P. 121.

(*q*) Godwin v. Francis, L. R. 5 C. P. 295; 39 L. J. C. P. 121.

puts money into the hands of another to purchase goods, and he neglects to make the purchase, and is sued for a breach of his undertaking in that behalf, the proper measure of damages is the value of the goods to the employer if they had been duly purchased, not the value of the money. (r)

Negligence of Bank-Managers. — It is no breach of duty on the part of the manager of a bank to discount bills for companies in which he is interested, provided the advances are made within the scope of his authority and in the ordinary course of business, and no allegation of *mala fides* can be sustained, nor is he, it seems, under any obligation to disclose to the directors [* 481] the fact * that he is a shareholder in companies keeping accounts with the bank. (s)

So it is the duty of the shareholder who has sold shares to execute a transfer of them, although the company is winding up, and he will be liable to his broker who has been obliged by the rules of the Stock Exchange to buy other shares for the purpose of delivery to the purchaser accordingly. (t)

Damages for Breach of Warranty of Authority. — Costs of Previous Legal Proceedings. — A defendant is responsible in damages for the natural and ordinary consequences of the wrong done. Where, therefore, the defendant, who was employed as architect to superintend the building of a church, ordered stone for the church from the plaintiffs in A's name and on his account, and the plaintiffs supplied the stone, and afterward sued A for the price, but failed in their action, and had to pay A's costs and the costs of their own attorney, because it was proved at the trial that the defendant had received no authority from A to order the stone in his name, and the plaintiffs then brought an action against the defendant to recover the damages they had sustained by reason of his false assumption of agency and pretence of authority for the order he gave, it was held that the plaintiffs were entitled to recover from the defendant not only the value of the stone ordered by him in A's name, but also the costs they had incurred and paid in the former action. (u) So

(r) *Ehrensperger v. Anderson*, 3 Exch. 158.

(s) *Bank of Upper Canada v. Bradshaw*, L. R. 1 P. C. 479.

(t) *Biederman v. Stone*, L. R. 2 C. P. 504.

(u) *Randell v. Trinen*, 18 C. B. 786; 25 Law J. C. P. 307.

where a land-agent professed to have authority from a landowner to let land, and signed an agreement for a lease, and the landowner repudiated the lease and denied the authority, and the intended tenant, relying on the representation of the agent, filed a bill in Chancery against the landowner for a specific performance of the agreement, and notice of the suit was given to the agent, and the latter failed to withdraw his assertion of authority, he was held liable to pay the costs of the Chancery suit. (x) But no person relying on a pretended authority of this sort ought in prudence to take legal proceedings against the supposed principal without giving notice to the pretended agent, and giving him an opportunity of withdrawing or verifying his assertion of authority. (y)

* SECTION IV.

[*482]

CONTRACTS FOR CARRIAGE.

Of Contracts for the Carriage of Merchandise.¹ — Every person who accepts goods and chattels for conveyance to a particular destination for hire or reward, paid or agreed to be paid him for the carriage of them, impliedly lets out his labor and care in return for the hire or reward agreed to be paid to him. The contract, therefore, belongs to the class *LOCATIO OPERIS*. It was styled by the Roman jurists *LOCATIO OPERIS MERCIUM VEHENDA-*

¹ For some discussions of the law of common carriers, which embrace all classes of carriers, not being limited either to ships, to railroads, or the like, see Angell, *Carriers* (5th ed.), 1877; Redfield, *Carriers*; Hutchinson, *Carriers* (1879); Lawson, *Contracts of Carriers* (1880); Thompson, *Carriers of Passengers* (1880); U. S. Dig. tit. *Carriers*; also ib. tit. *Bailment*; Abb. Nat. Dig. tit. *Carriers*; article on the Power of Congress to regulate inter-State commerce, by J. N. Pomeroy, 4 South. L. Rev. N. S. 357; Notes on the law of common carriers, by U. M. Rose, ib. 451; article on the Power of Usage, &c., to alter rules of law in the case of common carriers, by J. D. Lawson, 6 ib. 845-849; article on Contracts to carry goods at owner's risk, 15 West. Jur. 433.

(x) *Collen v. Wright*, 7 Ell. & Bl. 311; 8 ib. 647; 26 Law J. Q. B. 147; 26 Law J. Q. B. 151.
 (y) *Wightman, J.*, in *Collen v. Wright*, 27 ib. 215; *Spedding v. Nevell*, L. R. 4 C. P. 212.

RUM, or the letting out of the work of carrying merchandise. The owner who delivered the goods to the carrier to be carried was the letter of the work of carrying, and he was also at the same time the hirer of the labor and services of the carrier; whilst the carrier, on the other hand, was both the hirer of the work of carrying and the letter of his own labor and services, care, and attention, to be employed in and about the conveyance and transport of the merchandise. Such being the nature of the contract between the parties, the carrier may make a breach by negligently or wilfully omitting to take care, and an action may be brought for the breach of contract; or such negligent or wilful act may be treated as a "tort," regarding it as a breach of duty imposed by law upon the carrier. The cases upon the subject are somewhat conflicting. (a) Of course the parties may, and in most cases practically do, enter into a specific contract of carriage, and their rights are then governed by the express terms of such contract, and the implied terms which the law will infer; but apart from any special contract, there is in every case of carriage for reward a contract between the parties.

Contracts of Affreightment — Charter-parties.² — When goods and merchandise are carried by sea from one place to another, they are usually shipped on board a vessel under a charter-party or a bill of lading. A charter-party is a contract whereby the shipowner or the shipmaster covenants or agrees for the use of the ship by the charterer for some specified period of time, or for

² The law of affreightment and charter-parties has been comprehensively discussed within recent years by several American writers. 2 Pars. Contracts, 286-306; 1 Pars. Shipp. & Adm. c. 7, 8; Waples, Proc. in Rem. c. 50; Desty, Com. & Nav.; Desty, Shipp. & Adm.; Redf., Carr. c. 22; U. S. Dig. tit. *Shipping*, III. 1, 2; Ann. Dig. 1879, &c., tit. *Ships and Shipping*, IV.; Abb. Nat. Dig. tit. *Affreightment*; ib. tit. *Bills of Lading*, ib. tit. *Shipping*, III.; articles on Validity of State laws regulating bills of lading, 11 Cent. L. J. 181; on Bills of Lading, by A. Hamilton, 14 ib. 22; on Charter-parties, by O. F. Bump, 16 Am. L. Rev. 633, ib. 709; ib. 781; on Limitation of time for carriers presenting claim for damage, 21 Alb. L. J. 305; see further, Pollard v. Vinton, 25 Alb. L. J. 407; Skilling v. Bollman, 73 Mo. 66; Richmond v. Union Steamboat Co., 87 N. Y. 240.

(a) See Alton v. Midland Ry., 19 C. B. n. s. 213; 34 L. J. C. P. 292; Marshall v. Y. & N. Ry., 11 C. B. 655; Austin v. G. W. Ry., L. R. 2 Q. B. 442; Berringer v. Gt. Eastern Ry., 48 L. J. C. P. 400; Fleming v. M. S. & L. Ry., 4 Q. B. D. 81; Foulkes v. Met. Ry., 4 C. P. D. 267; 5 C. P. D. 157.

a particular voyage or adventure. The contract derives its name from the Latin term *charta partita*, there being anciently as many divided parts of the contract as there were parties to it, each party having his part of the contract as a security against fraud or mistake. * The customary stipulations [*483] on the part of the ship-owner or master are, that the ship shall be tight and staunch, and well equipped and manned, and furnished with all the necessaries for the voyage; that she shall be ready by a day appointed to receive the cargo, and shall wait a certain number of days to take it on board, and, after lading, shall sail with the first fair wind for the destined port, and there (b) deliver the goods in proper order and condition to the order of the charterer; and, further, that during the continuance of the voyage the ship shall be tight and staunch, and furnished with sufficient men and other necessaries, to the best of the owner's endeavors. The charterer, on the other hand, usually covenants to load the ship after she shall be ready to receive her cargo, and unload her within a certain number of days, and to pay freight at so much per ton according to the tonnage of the vessel, or according to the quantity of goods shipped on board, or according to the time of the ship's employment. *Prima facie*, the law of the place where a contract is made is that which the parties are to be presumed to have adopted as the footing upon which they dealt; and such law ought to prevail in the absence of circumstances indicating a different intention. But a contract of affreightment made between a charterer and ship-owner of different nationalities in a place where they are both foreigners, may, under some circumstances, be construed by the law of the nation of the ship. (c) But where an English merchant insured goods with English underwriters in a French ship, it was held that the policy was not to be construed according to French law. (d)

When the Contract operates as a Demise or Bailment of the Ship. — Although the ship-owner, by the charter-party, expressly

(b) Sometimes the terms are to proceed to a port, or so near thereto as the ship may safely get; see *Capper v. Wallace*, 5 Q. B. D. 163; *Dahl v. Nelson*, 6 Ap. Cas. 38.

(c) *Lloyd v. Guibert*, 6 B. & S. 100; L. R. 1 Q. B. 115; 35 L. J. Q. B. 74.

(d) *Greer v. Poole*, 5 Q. B. D. 272.

grants the vessel to be used by the charterer, the contract will, nevertheless, not amount in general to a demise or bailment of the ship to the charterer, so as to clothe him with the possession of the vessel, but simply to a contract for the use of the ship, together with the services of the master and crew, for the conveyance of merchandise, *i.e.*, to a contract for the letting and hiring of the work of carrying merchandise. If the end sought to be attained by a charter-party can be accomplished without a transfer of the possession of the vessel to the charterer, the courts will not give effect to the contract as a demise of the ship, although there may be express words of grant and demise. (e) If, however, the nature of the service and

[*484] the due *attainment of the object sought to be accomplished require the vessel to be absolutely under the control, and subject to the orders and directions, of the charterer; if she is to be employed in warfare, or in the fishing or coasting trade, or as a general ship for the conveyance of merchandise by the charterer for third parties, and is to be at the general disposal of the latter to sail upon any service that he may require, the courts will give effect to the contract as a demise of the ship. (f) In this case the contract is a contract for the letting and hiring of a chattel, and belongs to the class *LOCATIO REI* (*ante*, p. * 343). The services of the master and crew pass as merely accessorial to the principal subject-matter of the contract; they attorn, as it were, to the charterer, and become temporarily the servants of the latter, bound to obey his orders.

Parties to Charter-parties. — If the parties have contracted by deed, the contract is with those who have executed the instrument, and covenanted therein in their own names, or by some known title or description. If the charter-party contains covenants both on the part of the owners and the master for the conveyance of the cargo, and has been executed by both, either the owners or the master are responsible at the election of the coveantee. If it has been entered into and executed by the owners

(e) *Christie v. Lewis*, 5 Moore, 253; (f) *Trinity House v. Clerk*, 4 M. & 2 B. & B. 410; *Saville v. Campion*, 2 S. 295, 299; *Hutton v. Bragg*, 7 Taunt. B. & Ald. 510; *Dean v. Hogg*, 4 M. & 14. Sc. 195.

alone, they alone are liable upon it; whilst if the master is the only executing party, the contract is with him alone, although the deed may be expressed to be made by him for and on behalf of his employers, the shipowners. If the master covenants in his own name, the contract is exclusively the contract of the master. He constitutes himself in such a case the carrier of the goods, and becomes personally responsible upon the express covenants contained in the charter-party, and also upon all such implied covenants and engagements as result from the contract and the nature of the employment. (*g*)

When a charter-party of affreightment operates as a demise or bailment of the ship to the charterer, and the vessel is employed by the latter as a general ship for the conveyance of merchandise, the charterer becomes the carrier of the goods shipped on board, and the master is his servant and agent whilst procuring freight and contracting with third parties for the carriage of merchandise, and not the agent of the registered owners of the vessel, and the latter, consequently, cannot be made responsible for the loss of, or injury to, the goods shipped on board under such contracts. (*h*) But when the charter-party operates merely as a contract between *the charterer and the [*485] shipowner for the conveyance by the latter of goods and merchandise to be shipped on board by the charterer, the registered owners are then the carriers of the goods, and will be responsible to the charterer for the non-conveyance of them, according to their contract. And if the ship is put up as a general ship, without any intimation that she is under charter, and third parties ship goods and take bills of lading from the master, the owners will be responsible for the proper stowage and safe carriage of the goods so shipped. If in such a case the master refuses to sign bills of lading, except "as per charter-party," the shipper cannot be compelled to accept such bills, but may insist on having his goods returned. (*i*) Although the shipowners are not parties to a charter-party under seal, entered

(*g*) *Horsley v. Rush*, cited 7 T. R. 209.

(*h*) *James v. Jones*, 3 Esp. 27; *Major v. White*, 7 C. & P. 41; *ante*, p. *58; *Newberry v. Colvin*, 1 Cl. & F. 283.

(*i*) *Peek v. Larsen*, L. R. 12 Eq. 378; 40 L. J. Ch. 763; see *Jones v. Hough*, 5 Ex. D. 115, C. A.

into by the master in his own name on their behalf, yet they are responsible for a breach of those duties and obligations which attach to them in their character of carriers, independently of the charter-party. Thus where the plaintiff had shipped a cargo of oranges on board a vessel, of which the defendants were the owners, to be carried for hire from St. Michael's to London, but the defendants employed an unskilful master, through whose negligence the oranges were lost, it was held that the ship-owners were responsible for the loss, although the goods had been shipped on board by virtue of a charter-party of affreightment under seal executed by the master, by which the latter had covenanted to convey the cargo to its destination. (*k*) When the contract of affreightment is not under seal, the action for the breach of such contract, and of the implied promises and engagements resulting from the acceptance of goods to be carried for hire, may be brought, either against the owners who appoint the master to the command of the vessel, and constitute him their agent for the employment of the ship, or against the master who has accepted the goods to be carried, whether the contract is expressed to be made, or whether the goods have been accepted by him, in his own name only, or for and on behalf of his principals and employers; but when the plaintiff has elected to proceed against and has sued one, the other is discharged. (*l*) An agent is not ordinarily liable, as we have seen (*ante*, p. * 63), upon simple contracts entered into by him in a representative character on behalf of his principal; but the master of a ship is considered to be something more than a mere agent, and is made responsible accordingly. (*m*)

[*486] * **Performance of the Terms and Conditions of the Contract.** — If by a charter-party of affreightment, a shipowner agrees that his ship shall sail to a "safe port" to take in a cargo, the naming of a "safe port" is a condition precedent to the shipowner's liability to send out the vessel. (*n*) The

(*k*) *Leslie v. Wilson*, 6 Moore, 429; *Boson v. Sandford*, 1 Show. 104; *Morse v. Slue*, 1 Ventr. 190, 238; *Liver Alkali Co. v. Johnson*, L. R. 7 Ex. 267; 9 Ex. 338; 41 L. J. Ex. 110; 43 L. J. Ex. 216.

(*l*) *Priestley v. Fernie*, 23 H. & C. 216; 34 L. J. Ex. 172. (*n*) *Rae v. Hackett*, 12 M. & W. 724; 13 L. J. Ex. 216.

(*m*) *Ellis v. Turner*, 8 T. R. 533; 13 L. J. Ex. 216.

voyage begins from the time the vessel breaks ground to proceed to her place of loading; so that if the charter-party contains the usual exception of dangers and accidents of seas, rivers, and navigation during the voyage, and the vessel is delayed or hindered by foul weather in getting there, the delay is within the exception. (*o*) If the shipowner agrees that the vessel shall leave England on or before a particular day to bring back a cargo from a foreign port, or that she shall arrive at a foreign port by a particular day and shall be ready to receive cargo, the departure or arrival of the vessel at the time specified may constitute a condition precedent to the freighter's liability to provide the cargo and use the ship and pay freight. (*p*) Whether it will do so or not depends on the intention of the parties, to be gathered from the language they have used, and that intention may be inferred from the consequences of the breach; so that if the delay entirely defeats the object of the freighter in taking up the vessel, the agreement for departure or arrival by a certain day will be a condition precedent. (*q*) Where by charter-party the freighter covenanted to pay freight for a vessel at so much a ton per month until her final discharge, so much of such freight as might be earned at the time of the arrival of the ship at her first destined port abroad to be paid within ten days next after arrival there, and the remainder of the freight at specific periods, it was held that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight. (*r*) A shipowner by entering into a charter-party impliedly undertakes that the ship shall be reasonably fit for the carriage of a reasonable cargo of any of the kinds of goods specified in the charter-party; and if the ship is not so fit and cannot be made so in such a time as not to frustrate the object of the voyage, the charterer may decline to put a cargo on board, and may maintain an action against the shipowner. (*s*)

(*o*) *Barker v. M'Andrew*, 18 C. B. N. s. 759; 34 L. J. C. P. 191.

(*p*) *Glaholm v. Hayes*, 2 Sc. N. R. 471; *Shadforth v. Higgin*, 3 Campb. 385; *Lovatt v. Hamilton*, 5 M. & W. 644; *Oliver v. Fielden*, 4 Exch. 135; *Croockewit v. Fletcher*, 1 H. & N. 912;

26 L. J. Ex. 153; *Behn v. Burness*, 3 B. & S. 759; 32 L. J. Q. B. 204.

(*q*) *McAndrew v. Chapple*, L. R. 1 C. P. 643.

(*r*) *Graves v. Legg*, 9 Exch. 717; 23 L. J. Ex. 231.

(*s*) *Stanton v. Richardson*, L. R. 7 C. P. 421; 9 C. P. 390.

[*487] * **Representations in Charter-Parties.**—If a vessel is described in a charter-party as A 1, it is a warranty that she is A 1 at the time the description is given, but not that she shall continue so, or retain the same letter on her arrival at the port of loading. (*t*) A representation in a charter-party that the ship chartered is “now at sea, having sailed three weeks ago,” is a warranty; (*u*) and describing her as “the steamship H” is a warranty that the principal motive power is steam; (*x*) but a representation that she is 180 tons when she is 200, is mere description, and not a warranty. (*y*) A statement in a charter-party that the ship is expected to be at Alexandria about the 15th of December is a warranty that she is then in such a place and under such engagement as that she may reasonably be expected to be at Alexandria about the day named. (*z*) Whenever a descriptive statement in a charter-party was intended to be a substantive part of the contract, it will be construed as a warranty. Such a statement is more or less important in proportion as the object of the contract more or less depends upon it. In some cases if not performed by the party making it, it will enable the other to repudiate the contract *in toto*. In other cases it gives only a claim to compensation in damages for a breach of contract. (*a*)

Substantial Performance of Conditions Precedent.—Where the plaintiff covenanted to let his ship to freight to the defendants, and take a cargo on board, and proceed therewith to Naples and make delivery thereof to the agents of the defendants, and having so done, receive on board a return cargo, and the defendants in consideration of the premises, covenanted that they would provide a complete homeward cargo and pay freight, and the plaintiff received the cargo and proceeded with it to Naples, where it was seized by the Neapolitan Government, it was held that the material part of the covenant was the letting of the ship

(*t*) *Hurst v. Usborn*, 18 C. B. 154; 25 L. J. C. P. 209; *Routh v. Macmillan*, 33 L. J. Ex. 38; 2 H. & C. 750; *French v. Newgass*, 3 C. P. D. 163, C. A.

(*u*) *Ollive v. Booker*, 1 Exch. 416.

(*v*) *Fraser v. The Telegraph Construction Co.*, L. R. 7 Q. B. 566; 41 L. J. Q. B. 249.

(*y*) *Baker v. Windle*, 6 El. & Bl. 674.

(*z*) *Corkling v. Massey*, L. R. 8 C. P. 395; 42 L. J. C. P. 153.

(*a*) *Behn v. Burness*, 3 B. & S. 753; 32 L. J. Q. B. 204; *Neill v. Whitworth*, 34 ib. C. P. 155; 18 C. B. N. S. 435.

and the making of the voyage, and as that had been performed, the defendants were bound to provide the return cargo and pay the freight. (*b*) And where the plaintiffs let a ship to the defendants, and covenanted to take on board at Havre six pipes of brandy, with such other goods as the captain might procure on freight, and proceed therewith to Terceira, and there take a cargo on board and proceed therewith to London, and the defendants, in consideration of the * completion of the [*488] voyage, covenanted to pay freight, and guaranteed the ship a complete cargo home, and it appeared that the voyage to Terceira had been performed, and that the ship was ready to receive the return cargo at that place, it was held that the covenant relating to the taking on board the brandy at Havre and carrying it to Terceira was not a condition precedent to the liability of the defendants upon their covenant to provide the homeward cargo, but a distinct and independent covenant, for the breach of which the plaintiffs were liable in damages. (*c*)

Time of Performance. — If the vessel is to proceed to a particular port and there load a full cargo, the loading must be completed within a reasonable time; and if unusual and extraordinary circumstances arise preventing the merchant from doing what he has undertaken to do, he must make compensation in damages, as he ought to have provided against the unforeseen contingency by his contract. (*d*) Where, however, neither party is ready to perform his undertaking because both are prevented by some superior power, neither party can maintain an action against the other. (*e*) An engagement to load with “the usual despatch of the port” is absolute, and admits of no qualification to dispense with performance, even where the performance is hindered by a casualty which the charterer could not prevent. (*f*) Such an engagement covers the whole period from the time when the vessel is placed at the disposal of the charterer at the port

(*b*) *Storer v. Gordon*, 3 M. & S. 308.

(*c*) *Fothergill v. Walton*, 8 Taunt. 576; 2 Moore, 630; *Stavers v. Curling*, 3 Sc. 740; *Pust v. Dowie*, 33 L. J. Q. B. 172; 34 ib. 127; 5 B. & S. 20; *Behn v. Burness*, *ante*, p. * 487.

(*d*) *Adams v. Royal Mail, &c.*, 5 C. B. N. s. 497; 28 L. J. C. P. 33; *Ford*

v. Cotesworth, L. R. 5 Q. B. 544; 39 L. J. Q. B. 188; *Dahl v. Nelson*, 12 Ch. D. 568, C. A.; 6 Ap. Cas. 88; see *post*, p. * 510.

(*e*) *Cunningham v. Dunn*, 3 C. P. D. 443, C. A.; *Ford v. Cotesworth*, *supra*.

(*f*) *Kearon v. Pearson*, 7 H. & N. 386; 31 L. J. Ex. 1.

in a condition to receive her cargo. (*g*) If parties by advertisement hold out that they are ready to give a guarantee that a vessel shall sail on a particular day, and an intended passenger takes a berth on the strength of the assurance, the time named will be of the essence of the contract. (*h*) But this is not the case if merchandise is shipped on board and the vessel carries it to the place of destination. Where by charter-party the plaintiff let his vessel to freight to the defendant, and covenanted that the vessel should sail with the *next* wind on a voyage to Cadiz, and the defendant covenanted that if the ship went the intended voyage, and returned to the Downs, the plaintiff should have so much by way of freight for the voyage, the substance of the covenant was considered to be that the ship should perform [*489] the intended voyage, that being the *primary intention of the parties, and not merely that she should sail with the next wind, which might change every hour, and that this was shown by the covenant of the defendant, who was to pay so much for the performance of the voyage, and not merely for sailing with the next wind. (*i*) And where the covenant was that the vessel should proceed with the *first* convoy to Spain and Portugal, and there make a delivery of the cargo, &c., in consideration whereof the defendant covenanted to pay freight, it was held that the main object of the contract was the performance of the voyage, and that the sailing with the first convoy was not a condition precedent to the plaintiff's right to recover freight for the voyage actually performed, but a distinct covenant, for the breach of which he was liable in damages. (*k*) So where the covenant was that the ship should sail on freight to Demerara on or before the 12th of February, and the vessel did not sail until the 12th of March, Lawrence, J., held that, as the voyage had been actually performed, and the cargo conveyed to the destined port, and the profit of it gained by the defendant, there could be no foundation for saying that the defendant should not pay the freight for it according to the covenant, and that he might bring a cross action to

(*g*) *Ashcroft v. Crow Orchard Colliery Co.*, L. R. 9 Q. B. 540; see, however, the cases *post*, p. *511.

(*h*) *Cranston v. Marshall*, 5 Exch. 395; 19 L. J. Ex. 340.

(*i*) *Constable v. Cloberie*, Palm. 397; *Bornmann v. Tooke*, 1 Campb. 377.

(*k*) *Davidson v. Gwynne*, 12 East,

380.

recover damages for the not sailing in time, if he had sustained any. (*l*) And where the plaintiff let his vessel to the defendant and covenanted forthwith to make her tight, staunch, and strong, and well and sufficiently manned and victualled, &c., for a twelve months voyage, and the defendant covenanted to pay freight so much per ton per month, and the vessel was taken into the service of the defendant, who used her for several months, and then refused to fulfil his covenant to pay freight on the ground that the plaintiff had not manned and victualled the ship, and made her tight and strong, according to his covenant, it was held that as the defendant had not repudiated the ship because she was not forthwith made tight, staunch, and strong, but had taken her into his service and navigated her, he had no right to insist that the forthwith making her tight, &c., was a condition precedent to his own liability upon the covenant. (*m*) But where the plaintiff agreed to charter a ship at the completion of her then voyage, and she was detained as unseaworthy, and the repairs not finished for two months, it was held that the plaintiff had not got a ship reasonably fit for the purpose for which it was hired, and that he might abandon the charter-party. (*n*)

Reasonable Time of Performance. — If a shipowner covenants *generally that a ship shall sail to a par- [*490] ticular port, and there take on board a cargo to be provided by the charterer, the sailing of the vessel direct and without any deviation or delay to the appointed port is not a condition precedent to the charterer's liability to provide and ship the cargo; but if the delay has been unreasonable, and the charterer has thereby lost all the benefit of the voyage, and been prevented from procuring the cargo, he will then be released from his liability upon the contract. (*o*)

Waiver of Time of Performance. — If a shipowner agrees that his vessel shall leave England for a foreign port on or before a

(*l*) *Hall v. Cazenove*, 4 East, 477. 265; *Tairabochia v. Hickie*, 1 H. & N. 183; 26 L. J. Ex. 26; *Hurst v. Usborne*, 18 C. B. 144; 25 L. J. C. P. 209; *Jackson v. Union Marine Ins.*, L. R. 8 C. P. 572; 10 C. P. 125; see *Dahl v. Nelson*, 6 Ap. Cas. p. 53, *per* Ld. Blackburn.

(*m*) *Havelock v. Geddes*, 10 East, 564.

(*n*) *Tully v. Howling*, 2 Q. B. D. 182.

(*o*) *Clipsham v. Vertue*, 5 Q. B.

particular day to bring back a cargo, the departure of the vessel at the time specified is so far of the essence of the contract, that the charterer or freighter will not be bound to provide the cargo and use the ship and pay freight, unless the vessel sails at the time appointed (*ante*, p. * 486), and proceeds by the direct and usual course to the place of destination. If the failure to depart at the time specified is such, or the deviation is so long and unreasonable, as to have put an end to the whole object the freighter had in view in chartering the ship, (*p*) but if the vessel sails after the time, and the charterer nevertheless ships the cargo on board and uses the ship, the time of the vessel's sailing from England is no longer of the essence of the contract, and he cannot refuse to pay freight and to fulfil his part of the engagement because the vessel did not sail on the exact day specified. If it is covenanted by the shipowner that the ship shall be at a particular port by a day named ready to take a cargo on board, the charterer or freighter may not be bound by his covenant or agreement to ship a cargo on board and pay freight, if the vessel is not really at the place appointed by the day named; but if, after the day has passed, the cargo is shipped on board, pursuant to the covenant, the time of shipment cannot be relied upon as a condition precedent to the payment of the freight (*ante*, p. * 488).

Mode of Performance — Complete Cargo. — The performance of a contract that a vessel shall sail to a foreign port and there load a particular cargo, is to be regulated, as regards the loading of the cargo, by the custom and usage of the port where the cargo is to be taken on board. (*q*) If the charterer has agreed to load the ship with a full and complete cargo, he is [* 491] bound, in certain cases, *to fill up interstices with broken stowage. (*r*) In some cases he may load a full cargo of the lightest commodities; and if any ballast is then wanting, it must be put in by the master. (*s*) It is the duty of the owner of a vessel to stow the cargo with as much skill as a

(*p*) *Freeman v. Taylor*, 1 M. & Sc. 182; 8 Bing. 124; *Ollive v. Booker*, 1 Exch. 421.

(*r*) *Cole v. Meek*, 15 C. B. N. s. 795; 33 L. J. C. P. 183.

(*q*) *Cuthbert v. Cumming*, 11 Exch. 408; 24 L. J. Ex. 310; *Hudson v. Clementson*, 18 C. B. 213.

(*s*) *Irving v. Clegg*, 1 Bing. N. C. 53; *Moorson v. Page*, 4 Campb. 103.

competent stevedore can do. But he is not responsible to the charterer when the stevedore is appointed by the latter, although it is provided that he is to act under the master's orders; for such a provision only means that the master is to have a general control over the stevedore, so as to secure the proper trim and safety of the ship. (*t*)

Impossibility of Performance—Contracts to procure and carry Cargoes and Merchandise.—We shall hereafter see that it is a rule of law that whenever a party enters into an absolute and unqualified contract to do some particular act, the impossibility of performance occasioned by inevitable accident, or by some unforeseen occurrence over which he had no control, will not release him from the obligation of his contract. (*u*) Therefore, if a shipowner has covenanted to procure and ship on board a cargo of guano, corn, or timber at a specified port, the circumstance that no guano, corn, or timber was to be procured at that port, (*x*) or that its exportation had been prohibited, (*y*) or that the loading of it on board was prevented by an embargo, (*z*) or by want of water, (*a*) or by the plague, (*b*) will not constitute an answer to an action for the non-performance of the contract.

Implied Authority of the Agents of Ship-charterers.—The agent of the charterer of a ship to whom the ship is addressed for loading under a charter-party, has no implied authority to substitute a different voyage from that which is stipulated for by the charter-party, and cannot by agreement with the ship-master substitute a different port of loading, or a different quality or description of cargo, from that prescribed by the charter-party. (*c*)

Shipment and Carriage of Merchandise under Bills of Lading.—When the use of an entire vessel or a certain amount of stowage therein is not contracted for, but the merchant or owner

(*t*) *Blaikie v. Stembridge*, 6 C. B. N. S. 909; 28 L. J. C. P. 329.

(*u*) *Post*, p. * 1195.

(*x*) *Hills v. Sughrue*, 15 M. & W. 261; *Kirk v. Gibbs*, 1 H. & N. 815; 26 L. J. Ex. 209.

(*y*) *Blight v. Page*, 3 B. & P. 295, n.

(*z*) *Sjoerds v. Luscombe*, 16 East, 201.

(*a*) *Schilizzi v. Derry*, 4 Ell. & Bl. 886.

(*b*) *Barker v. Hodgson*, 3 M. & S. 267; *Marquis of Bute v. Thompson*, 13 M. & W. 487.

(*c*) *Sickens v. Irving*, 7 C. B. N. S. 165; 29 L. J. C. P. 25.

of the goods merely sends certain parcels or packages of goods on board, to be conveyed to the port of destination, the master or commander of the vessel, or some person acting for him, usually gives a receipt for them, and the master after-
 [*492] ward signs and delivers to * the merchant sometimes two and sometimes three parts of a bill of lading (*post*, p. * 935), of which the merchant commonly sends one or two to his agent, factor, or other person to whom the goods are to be delivered at the place of destination: that is, one on board the ship with the goods, another by the post or other conveyance, and one he retains for his own security. (*d*) The bill of lading is a written or printed memorandum, signed by the master, acknowledging the shipment of the goods on board, and promising to deliver them at the port of destination to a person named as the consignee, or his assigns, on payment of freight, primage, and average, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted." The master, who thus acknowledges the receipt of the goods, and promises to carry and deliver them, is personally responsible for the fulfilment of his engagement; (*e*) and the shipowner or charterer, who receives the fruit and earnings of the ship, is also liable upon the bill of lading, although he is not named therein. (*f*) Delivery to the shipowner's servants alongside the vessel is equivalent to a delivery on board. (*g*) The duty to deliver the goods under a bill of lading arises on presentment of the bill; and if it is not presented to the master on the arrival of the ship at her place of destination, the master is not bound to keep the goods for an indefinite time on board his ship, but may deliver them to any trustworthy person to be kept until the bill of lading is presented. (*h*) A bill of lading signed by the master in his own name is not conclusive upon the shipowner as to the shipment of the goods mentioned therein. (*i*) But it is

(*d*) Abbott on Shipping, by Serjt. Lim., *v. Nettleship*, L. R. 3 C. P. 499; Shee, 279. 37 L. J. C. P. 237.

(*e*) Domat, lib. 1, tit. 16, sect. 2.

(*f*) Cannan *v. Meaburn*, 8 Moore, C. P. 255; 9 C. B. 321; and see the 25 & 26 Vict. c. 63, sect. 67, *post*, p. * 502.

(*g*) British Columbia & Vancouver Island Spar, Lumber, and Saw-mill Co., (*i*) Grant *v. Norway*, 10 C. B. 688; Hubberstey *v. Ward*, 8 Exch. 334; Jessel

so in the hands of a consignee or indorsee for valuable consideration, as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same, that the goods had not been in fact laden on board. But the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or of some person under whom the holder claims. (*j*) The person actually putting the *goods on board is the shipper, and the expression [*493] “wholly,” &c., only means that the master or other persons signing must not in any way be mixed up with the fraud. (*k*) The consignee has no right to deduct from the freight payable on delivery of goods the value of articles which, though mentioned in the bill of lading, turn out not to have been put on board. (*l*)

Countermand of the Shipment.—Re-delivery of the Goods to the Consignor. — When goods have been shipped by a charterer or consignor on board a vessel to be carried and delivered to the consignee, pursuant to a contract of sale, or under bills of lading, or under any contract by which the ownership and right of property in the goods have been transferred to the consignee or some third party, the consignor's power over the goods is gone, and he cannot lawfully countermand the consignment and require the goods to be delivered back to him. He cannot, after he has ceased to be the owner of them, stop them *in transitu*, and prevent their delivery to the consignee, unless the latter has become bankrupt (*post*, p. *956). But if the goods are merely addressed to the consignor's agent for sale, or under circumstances which do not divest the consignor of his ownership and right of property in the goods, he may countermand the consignment and require the goods to be returned to him, subject to the

v. Bath, L. R. Ex. 267; 36 L. J. Ex. 149; *Brown v. Powell Coal Co.*, L. R. 10 C. P. 562.

(*j*) 18 & 19 Vict. c. 111, sect. 3.

(*k*) *Valieri v. Boyland*, L. R. 1 C. P. 382; 35 L. J. C. P. 215.

(*l*) *Meyer v. Dresser*, 16 C. B. N. s. 646; 33 L. J. C. P. 289; *ante*, p. *197, *post*, p. *966.

following qualifications and restrictions. If the ship is a general ship, carrying other goods besides those of the consignor, the goods must be demanded back a convenient time before the period appointed for the ship's sailing, and the demand must be accompanied by a tender of the freight and of the reasonable costs and charges of the re-shipment and re-delivery of the goods, and the demand must appear to have been made at a time when it was reasonably in the power of the master to comply with it, without injury to the cargo or the property of other parties on board, and without creating delay in sailing. If the entire vessel has been chartered, the charterer may demand back the goods, on tendering all the reasonable charges and lawful claims of the shipowner and master upon them, together with the expenses of re-shipment. (*m*) By the Spanish commercial code, every person who embarks goods in a general ship may unload the goods shipped, paying half freight, the expense of loading and unloading, and all the damage to the other shippers, unless these last oppose the unloading, in which case they are entitled to the goods, and must take them upon themselves, paying the contract price. (*n*) An owner of goods shipped [*494] * to proceed to a foreign port has a right to have them re-delivered to him when the vessel, having commenced her voyage, meets with a disaster whereby the goods are damaged so much that they cannot be profitably carried to their destination. (*o*)

Loss of or Damage to Goods by the Way.¹—Whenever a party has absolutely contracted to carry cargoes or merchandise

¹ In general, the presumption is against the carrier, where he alleges the dangers of navigation (*Bearse v. Ropes*, 1 Sprague, 331; *Hunt v. Cleveland*, 6 McLean, 76; *The Emma Johnson*, 1 Sprague, 527), or insufficiency in the packing as reasons for the loss of the goods in his charge (*The Live Yankee*, Deady, 420); the packing otherwise will be presumed to be sufficient (*English v. Ocean Steam Nav. Co.*, 2 Blatchf. 425). It is for the carrier to show proper stowage. *Edwards v. The Cahawba*, 14 La. Ann. 224. Where goods are shipped under the common bill of lading, it is presumed that they were intended to be put under deck. *Vernard v. Hudson*, 3 Sumn. 405; *The Peytona*, 2 Curt. 21. If damage existed in the

(*m*) *Thompson v. Small*, 1 C. B. 328; (*o*) *Blasco v. Fletcher*, 14 C. B. N. S. 14 L. J. C. P. 157. 147; 32 L. J. C. P. 284.

(*n*) Cod. de Com. 765, art. cited 1 C. B. 355.

from one place to another, subject to certain express exceptions, he has impliedly contracted to carry them safely; (*p*) and the circumstance that he has been prevented from fulfilling his contract by some casualty or inevitable accident will constitute no answer to an action brought against him for the recovery of damages for the breach of contract, if the casualty has not been expressly provided against by the contract. Therefore, where the defendant agreed to carry the plaintiff's goods by ship from Gibraltar to London, calling at Cadiz, and the goods were seized by the revenue authorities at Cadiz, and condemned and sold, it was held that such seizure and sale formed no answer to an action for the non-delivery of the goods. (*q*) If the vessel becomes disabled, and gets to port in a sinking state, the master is bound to transship and forward the cargo, if he has the means of transshipment at hand, (*r*) and is allowed a reasonable time to do so; (*s*) but if the vessel is wrecked, and the master has no means of transshipment (*t*) and no prospect of obtaining any, or if the cargo is of a perishable nature and cannot be transshipped and forwarded to the place of destination without risk of serious injury or total destruction, he is then clothed with an implied authority from the owners of such cargo to do the best he can with it for their benefit; and if, being unable to communicate with the owner, he acts *bona fide* with ordinary diligence, forethought, and prudence, he exempts his employers, the ship-

cargo when it was laden on board, this must be shown by the shipowners (*The Martha*, Olc. Adm. 140); but if a box of goods is delivered in externally good order, the carrier cannot be held liable (*Wentworth v. Realm*, 16 La. Ann. 18). Bad stowage will be presumed, where goods suffered from the sweating of the hold (*Montgomery v. The Abby Pratt*, 6 La. Ann. 409); and where a cargo is injured from apparently no cause, the presumption will be raised that the ship was in an unseaworthy condition (*Cameron v. Rich*, 4 Strobb. 168). If she strikes on an unknown snag or rock, the accident will be presumed to be inevitable. *Steamboat Co. v. Bason*, Harp. 262; *Williams v. Grant*, 1 Conn. 487.

(*p*) *Rogers v. Head*, Cro. Jac. 262; *Matthews v. Hopping*, 1 Keb. 852.

(*q*) *Spence v. Chodwick*, 10 Q. B. 517; 16 L. J. Q. B. 313; *Evans v. Hutton*, 5 Sc. N. R. 670; 2 Dowl. N. s. 600; *Gosling v. Higgins*, 1 Campb. 450.

(*r*) *Cannan v. Meaburn*, 8 Moore, 127.

(*s*) *The Soblomsten*, L. R. 1 Adm. 293; 36 L. J. Adm. 5.

(*t*) As to the duty of the master to transship and forward the goods, see *Shipton v. Thornton*, 9 Ad. & E. 337; *Gibbs v. Grey*, 2 H. & N. 30; 26 L. J. Ex. 286; *Mathews v. Gibbs*, 2 El. & El. 282; 30 L. J. Q. B. 55; but see *The Hamburg*, 32 L. J. Adm. 161.

owners, from all liability for the loss. (*u*) But where there is no urgent necessity for selling the goods, and the master can communicate with the owners, he must not sell without leave of the owners, (*x*) and if he does, such sale is void. (*y*) There is a duty on the master of a ship as representing the shipowner [*495] to take reasonable *care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures, when reasonably practicable under all the circumstances, to check and arrest the loss or deterioration resulting from accidents, for the necessary and immediate consequences of which the shipowner is not liable by reason of exceptions in the bill of lading; and for neglect of this duty by the master, the shipowner is responsible to the shipper. (*z*) But he is not entitled to carry on goods in an unfit state against the express wish of the shippers in order to earn the freight. (*a*) Damage done to a cargo by rats is not a danger or accident of the seas; and, therefore, if a ship is greatly infested by rats, and serious damage done to the cargo, the undertaker of the work of carrying is responsible for the injury, although he may have kept cats on board for the express purpose of destroying the rats. (*b*)

Of the Implied Promise to carry safely.—Whenever goods have been bailed by one man to another upon the faith of an express or implied undertaking by the latter to carry them to a distant part, it is no answer to an action brought against him to recover damages for the breach of his engagement, to say that the goods were lost by the way, the very fact of the loss affording *prima facie* evidence of neglect and want of care. (*c*) If the goods have been stolen, or consumed by fire, or destroyed by accident, without fault or neglect or want of care and caution on

(*u*) *The Gratitude*, 3 Rob. 261; B. 246; 7 Q. B. 225; 41 L. J. Q. B. Ireland v. Thompson, 4 C. B. 168; 17 158.

L. J. C. P. 241; *The Australasian Steam* (*a*) *Notara v. Henderson*, L. R. 5 Q. Co. v. Morse, L. R. 4 P. C. 222. B. 246; ib. 7 Q. B. 225; 39 L. J. Q. B.

(*x*) *Acatos v. Burns*, 3 Ex. D. 282, 167; 41 ib. 158.

C. A. (*b*) *Laveroni v. Drury*, 8 Exch. 170; 22 L. J. Ex. 2; *Kay v. Wheeler*, L. R. 16 Ch. D. 474. 2 C. P. 302; 36 L. J. C. P. 180.

(*z*) *Notara v. Henderson*, L. R. 5 Q. (*c*) *Parry v. Roberts*, 3 Ad. & E. 120.

the part of the undertaker of the work, the latter stands excused, and may avail himself of the robbery or the unavoidable accident as an answer to an action brought against him for the non-delivery of the goods to the consignee. "He is only," observes Holt, C. J., "to do the best he can; and if he be robbed, &c., it is a good account; for it would be unreasonable to charge him with a trust farther than the nature of the thing puts it into his power to perform it." (d) A loss by theft or secret purloining of goods is *prima facie* evidence of negligent keeping; and the carrier must rebut this presumption by showing that he had taken all such precautions as appeared to be necessary to guard against it. In an action against the commander of a ship of war for the loss of two casks of dollars which had been delivered to him to be carried from the River Plate to London upon freight for hire, it appeared that on the arrival of the ship in the Thames the two casks had * been opened and plun- [* 496] dered by the crew; and it was held that the very occurrence of the loss was *prima facie* evidence of negligent keeping on the part of the defendant, and that he was responsible for the loss. (e) In the contract of a shipowner to carry goods shipped on board his vessel there is an implied condition that the vessel shall be seaworthy, (f) except as to latent defects.

Limitation of Liability by Special Contract. — There are certain cases, as we shall presently see, where a carrier contracts for the conveyance of very perishable or fragile articles, in which he may accept the goods and contract to carry them on the express terms that he shall not be responsible for damage done to them in the transit (*post*, p. * 541). Generally speaking, however, it is not competent to a party to enter into a contract for the performance of a particular duty, and by the same contract to stipulate that he shall be exempt from *all* legal responsibility if he neglects to do what he has undertaken to perform. "We cannot," observes Lord Ellenborough, "construe a contract for the carriage of goods between the owners of vessels carrying goods

(d) Holt, C. J., 1 Smith's L. C., 5th ed. 181, 182.

(e) Hodgson v. Fullarton, 4 Taunt. 787; Hatchwell v. Cooke, 6 Taunt. 577.

(f) Kopitoff v. Wilson, 1 Q. B. D. 377; but see Schloss v. Heriot, 14 C. B.

n. s. 59; 32 L. J. C. P. 211; where the contrary was held (although it was admitted that an action would lie for negligence), and which does not appear to have been cited in Kopitoff v. Wilson.

for hire and the persons putting the goods on board, so as to make the owners say we will not be answerable at all for any loss occasioned by our own misconduct; for this would in effect be saying, 'We will be at liberty to receive your goods on board a vessel, however leaky; we will not be bound to provide a crew equal to the navigation of her; and if through these defaults the goods are lost, we will pay nothing.'" (g)

A stipulation in a bill of lading that the shipowner is not to be accountable for leakage or breakage, absolves him from responsibility for leakage and breakage the result of mere accident, where no blame is imputable, or for leakage the result of bad stowage, where the shippers have themselves superintended the stowage, (h) but does not exempt him from the obligation which the law imposes upon him of taking reasonable care of goods intrusted to him to be carried. (i) And an exception in a bill of lading of "accidents or damage of the seas, rivers, and steam navigation, of whatever nature or kind soever," does not protect the shipowner from liability for damage arising from [*497] a collision caused *by gross negligence of his ship's master and crew. (k) An exception of loss by thieves means *prima facie* persons outside the ship, and not belonging to it. (l)

Loss by the Act of God, Dangers and Accidents of the Seas, Rivers, and Navigation. — From losses occasioned by the act of God, by the Queen's enemies, and the dangers and perils of the sea and of navigation, the carrier by water is, and always has been, exempt by the common law; but he is not exempt, nor does the exception in the bill of lading or other contract of affreightment exempt him, from accidents occasioned by his own negligence and misconduct or want of skill, or the negligence, misconduct, or want of skill of the persons whom he has intrusted with the navigation of the vessel. (m) The expression

(g) *Lyon v. Mells*, 5 East, 438; *Ellis v. Turner*, 8 T. R. 531; see, however, *The Duero*, L. R. 2 A. & E. 293; 38 L. J. Adm. 69. General Steam Navigation Co., L. R. 3 C. P. 14; 37 L. J. C. P. 3.

(h) *Ohrloff v. Briscall*, L. R. 1 P. C. 231; 35 L. J. P. C. 63.

(i) *Phillips v. Clark*, 2 C. B. N. s. 164; 26 L. J. C. P. 168; *Czech v. The*

(k) *Lloyd v. Gen. Iron Screw Col. Co.*, 3 H. & C. 284; 33 L. J. Ex. 269.

(l) *Taylor v. Liverpool & Great Western Steam Co.*, L. R. 9 Q. B. 546.

(m) *Mansfield, C. J.*, 1 Doug. 278; *Siordet v. Hall*, 1 M. & P. 561.

“act of God” denotes natural accidents, such as lightning, earthquake, and tempest, and not accidents arising from the negligence of man. And the term “dangers and accidents of the sea and of navigation” denotes the dangers and accidents peculiar to the ocean and to navigation from port to port which no human care or skill can guard against or surmount, such as accidents resulting from the irresistible violence of the winds and waves, and from tides and currents; (*n*) the destruction of a perishable cargo or of living animals from the rolling of a ship in a storm; (*o*) jettison of goods from irresistible necessity to lighten the ship and save her from foundering; (*p*) the grounding of a vessel on the hard and uneven bottom of a dry harbor in which she had been obliged to take refuge, (*q*) or on a sunken rock or sandbank not generally known, and not marked on the ordinary charts or maps; irresistible attacks by pirates; (*r*) the accidental breaking of tackle by which the vessel is moored in port; (*s*) or accidental collisions in fogs or storms, where no blame is imputable to either of the vessels striking together. (*t*)

When a Loss occasioned by Negligence or Misconduct is not a Loss from Peril of the Sea, though the Sea does the Mischief.

— The general rule in cases of insurance is that the immediate and not the remote cause of loss is to be considered; but this rule does not apply as between the owner and carrier of goods. Thus if a vessel deviates from its proper course, and sails unnecessarily through dangerous straits and channels, or into seas infested with pirates, and is wrecked or plundered in consequence of such deviation, * the loss, though proximately caused by what is usually termed “a peril of the sea,” is deemed to have been occasioned by the misconduct of the master or commander, who had improperly gone out of his way to meet the danger. A collision arising from the negligence of the crew of the ship is not a peril of the sea within the meaning of an exception of loss arising from perils of the sea in

(*n*) *Hodgson v. Malcolm*, 2 B. & P. N. R. 336.

(*o*) *Lawrence v. Aberdeen*, 5 B. & Ald. 110.

(*p*) *Bird v. Astcock*, 2 Bulst. 280.

(*q*) *Fletcher v. Inglis*, 2 B. & Ald. 315.

(*r*) *Pickering v. Barclay*, Styles, 132.

(*s*) *Laurie v. Douglas*, 15 M. & W. 746.

(*t*) *Buller v. Fisher*, 3 Esp. 67.

a bill of lading. (z) If the cargo is seriously damaged or destroyed by rats, the loss is not the result of a danger or an accident of the seas, but of neglect and want of care on the part of the master and crew. (a) If a vessel becomes unseaworthy, and the owner neglects to avail himself of an opportunity to repair her, and thereby causes the loss of the cargo, the loss is the result of negligence. (b) If the vessel at the time of the commencement of the voyage is unseaworthy, — if the hull is worm-eaten or gnawed by rats, or the timbers are rotten, and the vessel is shaken to pieces and founders in a gale which a stout and seaworthy ship would have withstood in safety, — the loss, though proximately caused by the violence of the winds and waves, has not in contemplation of law been occasioned by perils of the seas, but by the negligence and misconduct of the owner of the ship, who is responsible to the owner of the cargo for the loss of the goods shipped on board. (c) When, on the other hand, from the rolling and laboring of a ship in a storm a number of horses, though properly stowed and secured on board at the commencement of the tempest, broke loose and kicked each other to death in the hold of the vessel, the loss, though proximately caused by their own hoofs, was deemed to have been occasioned by peril of the sea. (d)

“If a ship perish in consequence of striking against a rock or shallow, the circumstance under which that event has taken place must be ascertained in order to decide whether it happened by a peril of the sea or by the fault of the owner, carrier, or master. If the situation of a rock or shallow is generally known, and the ship is not forced upon it by adverse winds or storms and tempests, the loss is to be imputed to the fault of the master. And it matters not, in such a case, whether the loss arises from his rashness in not taking a pilot, or from his own ignorance or unskilfulness. On the other hand, if the ship is forced upon such a rock or shallow by adverse winds or tempests, or if the shallow is occasioned by a recent and sudden collection of sand

(z) *Grill v. The General Iron Screw* Col. Co., L. R. 1 C. P. 600; *ib.* 3 C. P. 476; 35 L. J. C. P. 321; 37 L. J. C. P. 205. (b) *Worms v. Storey*, 11 Exch. 430; 25 L. J. Ex. 1. (c) *Hunter v. Potts*, 4 Campb. 202. (d) *Gabay v. Lloyd*, 3 B. & C. 793.

(a) *Laveroni v. Drury*, *ante*, p. * 495.

in a place where ships could before sail with safety, or if the rock or shallow is not * generally known, — in [* 499] all these cases the loss is to be attributed to the act of God, and it is deemed a peril of the sea.” (e) If the carrier by water overloads his vessel, and so causes it to founder in a gale of wind, the loss is occasioned by the negligence of man; but it is otherwise if the boat has not been surcharged, but sinks solely through the violence of the winds and waves. (f) If a hoyman shoots a bridge in tempestuous weather or at a dangerous period of the tide, and the hoy is sunk, the loss is occasioned by the negligence of the hoyman; but if he has shot the bridge at a proper time and in proper weather, but the hoy has been taken aback by a sudden gust of wind, and has been driven against the abutments of the bridge and sunk, and the goods on board lost, the loss is deemed to have been occasioned by the act of God, and the carrier, consequently, is exempt from responsibility in respect thereof. (g)

Proof that the Loss was Occasioned by Negligence, and not by a Peril of the Sea. — In order to determine whether the loss has or has not been occasioned by the negligence or want of skill of the servants of the shipowner, “the established rules of nautical practice, the usages and regulations of particular ports and rivers, the state of the wind, the tide, and the light, the degree of vigilance of the master and crew, and all other circumstances bearing upon the conduct and management of the vessel must be considered.” (h)

Loss by Fire — Limitation of the Responsibility of Owners and Part Owners of Ships by Statute.¹ — By the 17 & 18 Vict.

¹ The corresponding statute in the United States is the Act of Congress of March 3d, 1851, now embodied in Rev. Stat. sects. 4282–4288. The decisions under it are collected, 4 Abb. Nat. Dig. tit. *Shipping*, sects. 333–338; 5 ib. sect. 110; 6 ib. 97–102; 7 ib. 44, 45; 8 ib. 30–36. See further, *The Benefactor*, 103 U. S. 239; *Matter of Liverpool, &c. Steam Co.*, 3 Fed. Reporter, 168; *Thommasen v. Whitwill*, 12 ib. 891; *Re Norwich, &c. Transp. Co.*, 17 Blatchf. 221; U. S. Dig. tit. *Shipping*, sect. 717; article on Limited liability of shipowners, by J. F. Mosher, 22 Alb. L. J. 165; ib. 185. The baggage of passengers is not “merchandise” within the statute. *The Marine City*, 6 Fed. Reporter, 412.

(e) Abbott, by Shee, 389, 8th ed.

(g) *Amies v. Stevens*, 1 Str. 128.

(f) 22 Assiz. 41; *Williams v. Lloyd*, Jones’s Rep. 180.

(h) Abbott, *ut sup.* 207; *Tuff v. Warman*, 5 C. B. N. s. 573.

c. 104, sect. 503, it is enacted that no owner of any sea-going ship or share therein shall be liable to make good any loss or damage which may happen without his fault or privity to any goods or merchandise taken on board such ship by reason of any fire happening on board, or to any gold, silver, diamonds, watches, jewels, or precious stones taken on board, by reason of any robbery, embezzlement, making away with or secreting thereof, unless the owner or shipper thereof has at the time of shipping the same inserted in his bills of lading, or otherwise declared in writing to the master or owner of such ship, the true nature and value of such articles. (i) And by the 25 & 26 Vict.

c. 63, sect. 24, the owners of any ship, whether British or foreign, (k) shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say:—(1) where any loss of life or personal injury is [*500] *caused to any person being carried in such ship;

(2) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship; (3) where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat; (l) (4) where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat—be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding £15 for each ton of their ship's tonnage; nor in respect of loss or damage to ship's goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding £8 for each ton of the ship's tonnage. By the 17 & 18 Vict. c. 104, sect. 516, nothing contained in the act is to take away any liability to which any master or seaman, being also

(i) The nature of the articles must be described, and their money value stated. *Williams v. Afric. St. Ship. Co.*, 1 H. & N. 302; 26 L. J. Ex. 69.

(k) *The Amalia*, 32 L. J. Adm. 191.

(l) As to the mode of procedure in case of loss of life or personal injury, see the 17 & 18 Vict. c. 104, sects. 507-512.

owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman.

The limitation of liability under the act of 1854 does not extend to the owner of any lighter, barge, boat, or vessel used solely in rivers or inland navigation, or to any ship or vessel not duly registered. (*m*) The acts, it will be seen, embrace two descriptions of losses: the one a loss or damage to the cargo laden on board the ship occasioned by the negligence of the master or mariners, and rendering the shipowner liable *ex contractu* at common law to the extent of the value of such cargo; and the other a loss or damage to the ship or cargo of some third party, occasioned by the negligence or misconduct of the master, in respect of which the owner is liable *ex delicto*, but not upon any contract. To an action *ex delicto* in respect of an injury to the property of a third party, both the shipowner and the master are liable—the owner as the employer responsible for the wrongful act done by the servant in the course of his employment, and the other as the party actually committing the injury; and it is this liability *ex delicto* to which the act of 1854 refers when it provides that nothing therein contained shall lessen or take away any responsibility to which any master or mariner might then by law be liable, notwithstanding such master or mariner might be an owner or part owner of his ship or vessel. If the master be a * part [* 501] owner, his responsibility, if he is sued (*ex delicto*) in his character of master, and not as one of several part owners, will not be limited by the act; but if he is sued as one of the part owners with the other part owners, the circumstance of the loss being occasioned by his fault and with his privity will not take away from the other part owners the protection which the statute intended to give them. (*n*) If the ship is sunk by a collision with another vessel, the shipowner is not released from liability by the loss of his vessel. (*o*)

Losses occasioned by the Negligence of Licensed Pilots.—The 17 & 18 Vict. c. 104, sect. 388, further exempts the owner

(*m*) *Morewood v. Pollok*, 22 L. J. Q. B. 250; 1 Ell. & Bl. 743. (*o*) *Brown v. Wilkinson*, 15 M. & W. 391; 16 L. J. Ex. 34; *The Mellona*,

(*n*) *Bayley, J., Wilson v. Dickson*, 2 B. & Ald. 13. 12 Jur. 271.

and master of a ship from liability in respect of losses or damage occasioned by the neglect or incapacity of a licensed pilot in charge of the vessel. "The shipowners are not responsible when they take a pilot by compulsion; but in all other cases they are responsible for the acts of the pilot." (*p*) "It is the duty of the master to look after the pilot in the case of his palpable incompetency, or intoxication, or of the loss of his faculties. The taking of a pilot under the act does not relieve the shipowner from the ordinary legal consequences resulting from the negligence of the master and crew." (*q*)

Delivery of Goods by Shipowners.—There is an implied engagement on the part of every undertaker of the work of carrying to proceed by the usual and ordinary course to the port of destination or place of delivery without delay, and without unnecessary deviation. (*r*) If it is customary for the carrier by water to carry merely from port to port, or from wharf to wharf, and for the owner or consignee to fetch the goods from the vessel itself, or from the wharf, as soon as the arrival of the ship has been reported, the carrier must give such owner or consignee notice of the arrival of the goods on board or at the customary place of destination, in order to discharge himself from further liability as a carrier. He cannot at once discharge himself from all responsibility by immediately landing the goods without any notice to the consignee, but is bound to keep the goods on board or on the wharf, at his own risk, for a reasonable time, to enable the consignee or his assigns

[* 502] to come and fetch them. (*s*) The Merchant * Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63, sects. 67, *et seq.*), empowers the shipowner to enter and land goods in default of entry and landing by the owner; and notwithstanding the landing, the shipowner may, by giving notice for that purpose, preserve his lien for freight. After part of the goods have been

(*p*) *The Energy*, L. R. 3 A. & E. 48; *The Iona*, L. R. 1 P. C. 4, 26; *The 39 L. J. Adm.* 25; *The Ocean Wave*, L. Velasquez, L. R. 1 P. C. 494; 36 L. J. R. 3 P. C. 205; *The Calabar*, L. R. 2 P. Adm. 19; *The Queen*, L. R. 2 A. & E. C. 238; *The Lion*, L. R. 2 P. C. 525; 354; 38 L. J. Adm. 39.
38 L. J. P. 57.

(*r*) *Davies v. Garrett*, 4 M. & P. 540;

(*q*) *Dr. Lushington*, *The Eden*, 10 6 Bing. 716.
Jur. 298; *The Duke of Manchester*, 10 (*s*) *Bourne v. Gatliff*, 3 Sc. N. R.
Jur. 865; *The Iron Duke*, 9 *Jur.* 476; 44; 8 ib. 604; 11 Cl. & Fin. 45.

landed by the shipowner, the consignee may interfere and claim the remainder, if the shipowner can deliver the remainder to him without any further loss or injury than would have been the case if the consignee had been ready before any of the goods were discharged. (*t*) The act also provides for the sale of the goods if they are not claimed by the owner. (*u*)

Losses on board Lighters conveying Goods from the Ship to the Shore.—When the vessel is not able to discharge at a wharf, but the goods are placed in lighters to be conveyed from the ship to the shore, and are lost on their passage through the neglect or want of skill of the lighterman, the loss will fall on the owner of the goods if the lighterman is paid and employed by him; (*x*) but if he is employed and paid by the shipowner or carrier, he is then the servant of the latter, expediting the goods in the further prosecution of the voyage to their place of destination, and the carrier, consequently, must make good the loss. Generally speaking, the task of discharging the cargo in the port of London is accomplished through the medium of public lightermen, whose lighters are entered at Waterman's Hall, and who are public officers employed and paid by the merchants and owners of the goods. The lightermen are responsible, in their character of common carriers, to the merchant who employs them; and the shipowner is discharged as soon as the goods have been safely loaded on board such lighters. But he is not, by the custom of the River Thames, exonerated from liability until the loading is complete; and he is not discharged from his obligation to guard the portion of the cargo that has been placed in the lighter by telling the lighterman that he has not sufficient hands on board to take care of it. He is, on the other hand, bound to take care of the lighter and its contents until it is fully laden and is ready to leave the side of the ship. (*y*) The protection afforded by the 17 & 18 Vict. c. 104, sect. 503 (*ante*,

(*t*) *Wilson v. London, Italian, and Adriatic Steam Nav. Co.*, L. R. 1 C. P. 61; 35 L. J. C. P. 9.

(*u*) *Beresford v. Montgomerie*, 17 C. B. n. s. 379; 34 L. J. C. P. 41; *Wilson v. London, Italian, and Adriatic Steam Nav. Co.*, 35 L. J. C. P. 9; L. R. 1 C. P. 61.

(*x*) *Sparrow v. Carruthers*, 2 Str. 1236; *Strong v. Nataly*, 4 B. & P. 16-19.

(*y*) *Catley v. Wintringham*, 1 Peake, 202; *Robinson v. Turpin*, ib. 203, n. (a).

p. *499), to owners of sea-going vessels in respect of loss or damage by fire to goods or merchandise shipped on board, does not extend to the case of a fire happening on board lighters [*503] *employed by the shipowner in carrying goods from the shore to be laden on board the vessel. (z) Therefore if goods are set on fire by reason of the negligence of such lightermen, the shipowners are responsible for the damage.

Payment of the Freight or Hire. — If a charter-party amounts to a demise of the ship to the charterer for a certain term at a certain hire, and the vessel is bailed to him pursuant to the contract, he is responsible for the payment of the hire at the expiration of the term of hiring, although the vessel may have been lost; but if the shipowner merely grants the use of the vessel, retaining the possession of it through the medium of his own seamen and servants, the shipowner loses his right to the hire at the same time that the charterer is deprived of the use and enjoyment of the vessel. When the charter-party amounts merely to a contract by the shipowner or shipmaster for the conveyance of merchandise to a specified destination, the fulfilment of the covenant or undertaking to carry the goods, or the shipowner's readiness and willingness to fulfil it, is a condition precedent to the payment of the hire, so that the plaintiff must of necessity show the work done, or that he was ready and willing to do it, and was hindered from doing it by the defendant, before he can demand the money. (a) Ordinarily, the right to the freight does not arise until the goods are not only conveyed to their destination, but also delivered; (b) or, in the case of a charter-party, until the charterers have had the full use of the ship for the purposes for which they chartered it. (c) The freight may, however, by the special contract of the parties be made payable on the delivery of the goods on board, (d) on the sailing, (e) or on the

(z) *Morewood v. Pollok*, 22 L. J. Q. B. 250; 1 Ell. & Bl. 743.

(a) *Tate v. Meek*, 2 Moore, 291; *Campion v. Colvin*, 3 Sc. 350; 3 Bing. N. C. 17; *Pothier, Traité de la Chartre-partie*, part 1, sect. 3, sect. 2; *Cleary v. M'Andrew*, 2 Moo. P. C. N. s. 216; *The Soblomsten*, L. R. 1 Adm. 293; 36 L. J. Adm. 5.

(b) *Cato v. Irving*, 5 De G. & S. 210, 224; 21 L. J. Ch. 675.

(c) *Brown v. Tanner*, L. R. 3 Ch. 597; 37 L. J. Ch. 923.

(d) *Andrew v. Moorhouse*, 5 Taunt. 438; 1 Marsh. 122; *De Silvale v. Kendall*, 4 M. & S. 42; *Allison v. Bristol Marine Ins. Co.*, 1 Ap. Cas. 209.

(e) *Thompson v. Gillespy*, 5 Ell. &

final sailing of the vessel from the port of loading (*f*) prior to the performance of the voyage, or at any other period of time which they may choose to appoint; but in all cases of doubtful construction, the courts will adhere to the maxim that the freight is not due until it has been earned by the performance of the work for which it is to be paid. (*g*) Where part of the cargo was justifiably sold for repairs before arrival at the port of destination, and sold for more than it would fetch at the * port of destination, and the proceeds paid to the char- [* 504] terer, it was yet held that freight could not be claimed in respect of such part of the cargo. (*h*) Where the freight was to be paid "within three days after the arrival of the ship and before delivery of any portion of the goods," and the ship arrived in port, but was sunk and the goods destroyed within the three days, it was held that the freight was not payable. (*i*) If freight is paid in advance and the cargo is lost, the freight so paid cannot be recovered back (*k*) unless the loss has been occasioned by negligence or misconduct, or want of skill in the navigation of the vessel. If by the occurrence of an accident on the voyage delay is occasioned, the master may claim a reasonable time to carry on the cargo, either in the same ship when repaired, or by transshipping it into another vessel. (*l*)

When the use of the entire vessel is bargained for, (*m*) and the charterer covenants or agrees to provide and ship a full cargo and pay freight therefor at so much a ton, and the shipowner sends out the vessel, the circumstance that the lading has been prevented by some unforeseen cause or inevitable accident does not release the charterer from his contract. And when the goods

Bl. 209; 24 L. J. Q. B. 340; Hudson v. Bilton, 6 Ell. & Bl. 565; 26 L. J. Q. B. 27.

(*f*) Roelandts v. Harrison, 9 Exch. 444; 23 L. J. Ex. 169.

(*g*) Mashiter v. Buller, 1 Campb. 84; Abbott, C. J., Manfield v. Maitland, 4 B. & Ald. 585; Vlierboom v. Chapman, 13 M. & W. 230.

(*h*) Hopper v. Burness, 1 C. P. D. 137.

(*i*) Duthie v. Hilton, L. R. 4 C. P. 138; 38 L. J. C. P. 93.

(*k*) Saunders v. Drew, 3 B. & Ad. 450; Byrne v. Schiller, L. R. 6 Ex. 319; 40 L. J. Ex. 177; Allison v. Bristol Marine Ins. Co., *supra*. This is contrary to the law in other European countries and in America. Byrne v. Schiller, *supra*.

(*l*) Cleary v. M'Andrew, 2 Moo. P. C. N. s. 216.

(*m*) As to putting cargo in the cabin, see Mitcheson v. Nicol, 7 Exch. 929; and on deck, see Neill v. Ridley, 9 Exch. 680.

have been shipped on board, the charterer cannot abandon them and refuse to pay the freight on the ground that they have been damaged or destroyed by perils of the sea, (*n*) or by the fault of the master and crew; (*o*) nor can he deduct from the freight the value of missing articles. (*p*) When the charterer merely covenants to pay freight at the rate of so much a ton, &c., for the goods actually shipped on board, and does not covenant to furnish any particular quantity of goods, he is only liable for the quantity of goods actually shipped; but if he contracts for the use of the entire ship or part of a ship, or for a certain specified tonnage, the payment of freight must be proportioned to the amount of tonnage space or accommodation he has contracted for. If he covenants to ship on board a full and complete cargo, and to pay so much a ton for every ton loaded on board, he is bound to put on board and to pay freight for as much as the ship will hold and safely carry, whatever may be the

[* 505] amount of the burthen and tonnage of * the vessel mentioned in the charter-party. A misdescription of the ship's burthen does not in such a case exonerate the charterer from the liability to ship on board, and to pay freight for, a full and complete cargo, provided the charterer has had an opportunity of examining the ship and forming his own judgment of her capacity, and there has been no fraudulent misrepresentation or concealment of the truth. (*q*) Although the charterer has taken the whole ship, and covenanted to provide and put on board, and pay freight for, a "full and complete cargo," yet the shipowner may take on board merchandise as ballast, provided it occupies no larger space than the ballast would have done, and does not interfere with the proper shipment and carriage of the cargo. (*r*)

Calculation of the Freight.—When freight is covenanted to be paid at the rate of so much per ton, the freight is to be calculated and paid on that quantity alone which is put on board, carried throughout the whole voyage, and delivered, at the end

(*n*) Abbott on Shipping, 380, 381.

(*o*) *Dakin v. Oxley*, 15 C. B. N. S. 646; 33 L. J. C. P. 115.

(*p*) *Meyer v. Dresser*, 16 C. B. N. S. 646; 33 L. J. C. P. 289.

(*q*) *Hunter v. Fry*, 2 B. & Ald. 424;

Thomas v. Clarke, 2 Stark. 450; *Barker v. Windle*, 6 Ell. & Bl. 675.

(*r*) *Towse v. Henderson*, 4 Exch. 893.

of it to the merchant. If, therefore, a cargo of corn increases in bulk and weight during the voyage, or after the cargo is taken out of the vessel, the freight is payable only on the quantity actually shipped on board, and not on the increased quantity delivered; for such a cargo may be increased in bulk and deteriorated in quality by the negligence of the master and crew during the voyage. (s)

Payment pro rata.—If the covenant or agreement of the shipowner or master be entire for the conveyance of a full cargo of merchandise for a specific sum, the charterer is not bound to accept and pay for half a cargo; but if the charterer loads less than a full cargo, or if part of the cargo is lost without any default on the part of the shipowner, the whole of the sum is payable. (t) And if he agrees to pay by the bale or cask, or at the rate of so much a ton, he is bound to accept and pay for what has been actually brought and tendered to him. (u) He must pay, also, in all cases for such goods as he actually accepts; and if he voluntarily accepts goods short of the port of destination, so as to raise an inference that further carriage of the goods was dispensed with, (x) he is liable upon an implied contract to pay *pro rata itineris peracti*. This apportionment usually happens when the ship, by reason of some disaster, goes into a port short of the place * of destination, and is [*506] unable to prosecute and complete the voyage. (y) The shipowner is not entitled to freight *pro rata* where goods have been sold on the voyage at an intermediate port without leave from the owners where such leave was obtainable. (z)

Time Freight.—When the charterer engages to pay so much per month, week, or day of the voyage, or of the ship's employment, and no time is fixed for the commencement of the com-

(s) *Gibson v. Sturge*, 10 Exch. 622; 24 L. J. Ex. 121; *Buckle v. Knoop*, L. R. 2 Ex. 125, 333; 36 L. J. Ex. 49, 223.

(t) *Robinson v. Knights*, L. R. 8 C. P. 465; 42 L. J. C. P. 211; *The Norway*, 3 Moo. P. C. N. s. 245; *Merchant Shipping Co., v. Armitage*, L. R. 9 Q. B. 99; *Blanchet v. Powell's Llantwit Coll. Co.*, L. R. 9 Ex. 77.

(u) *Christy v. Row*, 1 Taunt. 314; *Ritchie v. Atkinson*, 10 East, 295, 310.

(x) *The Soblomsten*, L. R. 1 Adm. 293; 36 L. J. Adm. 5; but as to when this inference arises, see *Metcalfe v. Britannia Iron Works Co.*, 1 Q. B. D. 613; 2 Q. B. D. 423 C. A.

(y) *Vlierboom v. Chapman*, 13 M. & W. 239.

(z) *Acatos v. Burns*, 3 Ex. D. 282, C. A.

putation, his liability to the freight will begin on the day that the ship breaks ground and commences the voyage, and will continue during all unavoidable delays for provisions, repairs, &c., not occasioned by the negligence or misconduct of the master or owners. (a) The month is always understood to be a calendar, and not a lunar, month; (b) and the freight becomes due in general at the expiration of each month, or other interval of time limited by the parties for its payment, whether the ship does or does not ultimately arrive at her place of destination. But where the freighter covenanted to pay freight for a vessel at so much a ton per month until her final discharge, so much of such freight as might be earned at the time of the arrival of the ship at her first destined port abroad to be paid within ten days next after her arrival there, and the remainder of the freight at specific periods, it was held that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover *any* freight. (c)

Shipowner's Lien for the Freight—Payment of Freight by the Consignee.—If the shipowners have by the charter-party divested themselves of the possession of the vessel in favor of the charterer, they have, of course, no lien upon the goods shipped on board, and cannot take possession of them and detain them as a security for the rent or hire agreed to be paid for the use of the vessel. (d) But if the charter-party does not amount to a bailment of the ship, but the shipowners keep possession of the vessel, and contract merely to carry merchandise for the charterer for certain freight, the delivery of the goods and the payment of the freight constitute mutual conditions to be performed at the same time, so that the shipowner may retain the cargo until he is tendered payment of the freight. (e) When, however, by the terms of the contract credit is given for the payment [*507] of the freight, as, for instance, if it is to be paid a month or three months after the arrival of the ship, the carrier must forthwith deliver the goods, and rely on the subse-

(a) *Havelock v. Geldes*, 10 East, 566; *Ripley v. Scaife*, 5 B. & C. 169.

(b) *Jolly v. Young*, 1 Esp. 186.

(c) *Gibbon v. Mendez*, 2 B. & Ald. 17; *Smith v. Wilson*, 1 East, 437.

(d) *Hutton v. Bragg*, 7 Taunt. 14.

(e) *Saville v. Campion*, 2 B. & Ald. 503; *Campion v. Colvin*, 3 Sc. 388; 3

Bing. N. C. 17; *Tate v. Meek*, 2 Moore,

293; *Paynter v. James*, L. R. 2 C. P. 348.

quent performance by the charterer of his contract to pay; (*f*) and if the latter becomes bankrupt prior to the arrival of the vessel at the port of destination, the indorsee of the bill of lading is entitled to demand the goods, and the shipowners cannot claim any lien upon them for freight. (*g*) If the master does not think fit to insist on his right of detention, but delivers the goods to the consignee, and the latter afterward refuses to pay the freight, or pays the master by a bill of exchange which turns out to be worthless, the master may resort to the consignor or shipper for payment, (*h*) unless he has for his own convenience and accommodation preferred a bill when he might have had cash. (*i*) Payment to the shipowners on their demand is a discharge against any claim by the master; and, on the other hand, payment to the master, in the absence of any notice from the owners to withhold it, is a valid payment as against them. (*k*) The consignee is *prima facie* the owner of the goods, and as such is liable for the freight; but if he be not the owner, he is not liable for freight simply as consignee, except on a new contract to pay the freight. If the goods have always been delivered on payment of freight by the defendant, that is reasonable evidence that in the particular case he agreed to pay the freight. (*l*)

Of the Liability for Freight resulting from the Acceptance of Goods under Bills of Lading. — It has been held that if a person receives goods under a bill of lading in which it is expressed that the goods are to be delivered to him, he paying freight, he by implication agrees to pay freight. (*m*) The law does not, however, imply any contract for the payment of the freight from the delivery and acceptance of less than the whole cargo, (*n*) or from the mere fact of the acceptance of the goods; but it is for a jury to say whether the acceptance, coupled with the particular

(*f*) *Alsager v. St. Kath. Dock Co.*, 14 M. & W. 794; 15 L. J. Ex. 34.

(*g*) *Tamvaco v. Simpson*, L. R. 1 C. P. 363; 35 L. J. C. P. 196.

(*h*) *Tapley v. Martens*, 8 T. R. 453; *Shepard v. De Bernales*, 13 East, 572; *Domett v. Beckford*, 5 B. & Ad. 521.

(*i*) *Strong v. Hart*, 6 B. & C. 160.

(*k*) *Smith v. Plummer*, 1 B. & Ald. 575; *Atkinson v. Cottesworth*, 3 B. & C. 648.

(*l*) *Coleman v. Lambert*, 5 M. & W. 505.

(*m*) *Cock v. Taylor*, 13 East, 403; *Wilson v. Kymer*, 1 M. & S. 157; *Bell v. Kymer*, 5 Taunt. 477; *Gumm v. Tyrie*, 33 L. J. Q. B. 97; 34 ib. 124; 6 B. & S. 299.

(*n*) *Young v. Moeler*, 5 Ell. & Bl. 762; s. c. nom. *Möller v. Young*, 25 L. J. Q. B. 94.

terms of the bill of lading under which the goods were received, establishes the existence of a contract on the part of the consignee to pay the freight. (*o*) The words "he paying freight" are not essential; "freight for the said goods" are sufficient. [* 508] (*p*) Though freight * may not be payable in respect of a man's own goods conveyed in his own ship, yet it becomes so if he makes third persons consignees of the goods under the bill of lading. (*q*) If the consignee receives the goods without any disclaimer of his liability, and there is no reference on the face of the bill of lading to any charter-party whereby the consignor has contracted to pay the freight, the presumption is that the consignee has agreed to pay it; but when the bill of lading provides for the payment of the freight as per charter-party, and the consignor has contracted by such charter-party for the payment of the freight, it does not necessarily follow that the consignee, by accepting the goods under the bill of lading, has himself contracted to pay it, although he is generally considered so to do. The contract for the payment of the freight inserted in the charter-party does not run with the property in the goods, and is not transferred with it so as to throw the burthen of performance upon the parties into whose hands the goods come by indorsement of the bill of lading. But it has been so much the practice for the indorsee of the bill of lading to pay the freight which the consignor or charterer has by the charter-party contracted with the shipowner to pay, that the acceptance of the goods by such indorsee without any disclaimer of his liability is evidence of a new contract and a new agreement for the payment of the freight mentioned therein, the consideration for which is the delivery of the goods to him at his request; (*r*) and if such new contract is established, the remedy for the freight on the bill of lading against the consignee or his assignee co-exists with the remedy against the original consignor or charterer upon the charter-party. (*s*) Where a charter-party stipulating for freight in a lump sum of £2800 in full of all

(*o*) *Zwilchenbart v. Henderson*, 9 Exch. 722; 23 L. J. Ex. 234.

(*p*) *Weguelin v. Cellier*, L. R. 6 H. L. 286.

(*q*) *Weguelin v. Cellier*, *supra*.

(*r*) *Sanders v. Vanzeller*, 4 Q. B. 295; *Kemp v. Clark*, 12 Q. B. 647.

(*s*) *Christy v. Row*, 1 Taunt. 300; *Shepard v. De Bernales*, 13 East, 565.

charges, contained the following clause: "The captain to sign bills of lading at any rate of freight without prejudice to this charter," it was held that so long as the goods shipped remained the property of the charterers or of their agents, they were liable to the lump freight, and the shipowners had a lien for it, but that the shipowners might be bound to deliver the goods to a *bona fide* holder for value of the bill of lading upon payment of the freight mentioned in the bill of lading. (t) The master has no authority to draw bills of lading making the freight payable otherwise than to the owner. (u) If the amount of the freight is specified on the face of the bill of lading, it is in general conclusive between the parties. (x) Where, * there- [* 509] fore, a mere nominal rate of freight was provided to be paid by the bill of lading, the shipowner being also owner of the cargo, it was held that a subsequent mortgagee of the ship and freight could not charge the assignee of the bill of lading the current rate of freight, but was confined to the nominal freight specified on the face of the bill of lading. (y) If the receiver of the goods appears on the face of the bill of lading to be an agent acting on behalf of a known principal who is the consignee, the principal and not the agent is then liable for the freight. (z) But if the agency is undisclosed, and the principal has given the agent no authority to pledge his credit for the payment of the freight, and the goods never reach the hands of the principal, the latter cannot be made responsible for the amount of the freight; (a) and the agent who actually received the goods under the bill of lading is then the party to be proceeded against. (b) If the consignee of goods indorsed the bill of lading to A with the words "looking to him for all freight, dead freight, and demurrage, without recourse to us," and the shipowner accepted the indorsement, and in pursuance of it delivered the goods to A, the consignee is exonerated from liability for freight (c); but the

(t) *Gledstanes v. Allen*, 12 C. B. 202.(u) *Reynolds v. Jex*, 34 L. J. Q. B. 805.
251.(x) *Foster v. Colby*, 3 H. & N. 715; 718.28 L. J. Ex. 81; *Shand v. Sanderson*, 4 H. & N. 389; 28 L. J. Ex. 278.(y) *Brown v. North*, 8 Exch. 1; 22 L. J. Ex. 49.(z) *Amos v. Temperley*, 8 M. & W.(a) *Tobin v. Crawford*, 9 M. & W.(b) *Dougal v. Kemble*, 3 Bing. 383; 11 Moore, 250.(c) *Lewis v. McKee*, L. R. 2 Ex. 37.

consignee, at all events where A is his agent, is bound to prove an assent on the part of the shipowner discharging him from liability ; and he does not prove such an assent by showing that the indorsement was on the bill when presented to the captain, without also showing that the captain in fact assented to it. (*d*) Where a bill of lading represented the freight of goods to have been paid when in fact it had not been paid, it was held by the court that though such representation was not conclusive as between the shipper of the goods and the shipowner, yet, as against an indorsee for value of the bill of lading without notice, the freight must be held to have been paid. (*e*)

Where by the terms of the charter-party the ship is let for a particular voyage, and the charterers are to pay the shipowners a lump freight for the whole voyage, and the master, at the request of the charterers, is to make bills of lading at any rate and payable in any manner the charterers may choose, without prejudice to the charter, this gives to the charterers the direct management as to the terms on which the bills of lading are to be signed. And when it is once shown that the master was in fact acting for the charterers, and this is made known [* 510] to the * shippers, the charterers are entitled to recover the freight under the general authority which the shipowners have conferred upon them. (*f*)

Stipulated Payments in lieu of Freight extinguishing the Right of Lien. — When it is stipulated that a certain specified sum of money shall be paid in respect of goods shipped on board a particular vessel within a certain specified period after the sailing of the vessel, whether the goods shall then have been conveyed to their place of destination or not, or whether they shall ever be so conveyed or not, and to secure this arrangement the amount is made payable by the shipper, the sum stipulated to be paid is not freight, but a payment in lieu of freight. In this case there is no lien upon the goods to secure the payment, neither the consignee nor his goods being liable for the payment of the sum stipulated to be paid, which is held to be not freight, but a re-

(*d*) *Lewis v. McKee*, L. R. 4 Ex. 58.

(*e*) *Howard v. Tucker*, 1 B. & Ad. 712; *Kirchner v. Venus*, 12 Moore, P. C. 339.

(*f*) *Marquand v. Banner*, 6 Ell. &

Bl. 215; 25 L. J. Q. B. 313; *Kern v. Deslandes*, 10 C. B. N. s. 205; 30 L. J. C. P. 297.

muneration for receiving the goods, with a qualified contract for conveying them, and not a reward for actual conveyance. (*g*) But parties who have by special contract superseded the rights and obligations which the law attaches to freight in its legal sense may, if they think fit, create a lien on the goods for the performance of the agreement into which they have entered; and they may do this either by express conditions contained in the contract itself, or by agreeing that, in case of failure of performance of that agreement, the right of lien for what is due shall subsist as if there had been an agreement for freight; and the usage of the place where the contract was made may be annexed to the contract so as to create a lien, provided both parties were cognizant of the usage at the time they made their contract. (*h*)

Payment of Demurrage on Charter-Parties and Bills of Lading.

—Where the charter-party is silent as to the time to be occupied in the discharge, the contract implied by law is that each party will use reasonable diligence in performing that part of the delivery which, by the custom of the port, falls upon him; and there is no implied contract by the shipowner to allow his vessel to be kept there the usual time, if, by reasonable diligence on the part of the merchant the cargo might be sooner taken away; and no implied contract by the merchant to take the cargo out within such usual time, if he could not by reasonable diligence do so. The contract implied is that each should use reasonable despatch in performing his part. Where, therefore, delay happens without fault on either * side, the loss must remain [* 511] where it falls. (*i*) The charterer usually covenants or promises to load or unload the vessel within a certain time, or, if he fails so to do, to pay so much *per diem* during the delay. This payment, as well as the delay itself, is called in mercantile and legal phraseology, demurrage. The charterer cannot escape from liability upon his express covenant or promise to pay demurrage by showing that the delay was occasioned by some unforeseen event not provided for by the contract, such as the

(*g*) *How v. Kirchner*, 11 Moore, P. C. 25.

(*h*) *Kirchner v. Venus*, 12 Moore, P. C. 398; *Fisher v. Smith*, 4 Ap. Cas. 1.

(*i*) *Ford v. Cotesworth*, L. R. 4 Q. B. 127; 5 Q. B. 544; 39 L. J. Q. B. 188; *Cunningham v. Dunn*, 3 C. P. D. 443, C. A.

delays of other consignees in unloading, (*k*) the crowded state of the docks, the delays of Custom House officers, or the inclemency of the weather, (*l*) or bad weather, (*m*) or even a permanent obstacle, (*n*) or the neglect of the holders of the bill of lading to present it and claim the goods. (*o*) But if the delay is occasioned by the wrongful and unauthorized interference of the shipowner himself with the unloading of the cargo, the detention is not then the detention of the charterer, and the shipowner cannot claim demurrage in respect thereof. (*p*) When a port is named in the charter-party as the port to which the vessel is to proceed, the lay days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port, not the actual berth at which she loads, but the dock or roadstead where loading usually takes place. (*q*) If when she arrives there the place is so crowded that she cannot load, the loss must fall on the charterer; the shipowner has done all he was required to do when he has taken his vessel to the usual place of loading in the port, (*r*) and he is not bound to wait an unreasonable time till the port is cleared. (*s*) A stipulation that the vessel shall proceed to A, and there load a cargo "in the usual and customary manner," applies to the mode of loading, whether by a lighter or at the wharf, and not to the place to which the shipowner undertakes that the ship shall proceed. (*t*) Where a charter-party provided that the cargo should be "discharged with all despatch according to the custom of the port," and the custom was to unload by lighters in turn, and delay arose while waiting for the turn, it was held the jury [**512*] were *rightly directed that if the defendants had used the existing means at the port with reasonable de-

(*k*) *Straker v. Kidd*, 3 Q. B. D. 223; 265, C. A.; *Dahl v. Nelson*, 12 Ch. D. 568; 6 Ap. Cas. 38.

(*l*) *Blight v. Page*, 3 B. & P. 295, n.; (*r*) *Tapscott v. Balfour*, L. R. 8 C. P. 46; 42 L. J. C. P. 16; *Ashcroft v. Barret v. Dutton*, 4 Campb. 333.

(*m*) *Thiis v. Byers*, 1 Q. B. D. 244.

(*n*) *Dahl v. Nelson*, 12 Ch. D. 568; (*s*) *Dahl v. Nelson*, 6 Ap. Cas. 38.

(*o*) *Erichsen v. Barkworth*, 3 H. & N. 894; 28 L. J. Ex. 95.

(*p*) *Benson v. Blunt*, 1 Q. B. 870.

(*q*) *Tapscott v. Balfour*, *infra*; see, (*t*) *Tapscott v. Balfour*, *supra*. See *Kay v. Field*, 8 Q. B. D. 594. The mode of loading may be connected with the place of loading; *Coverdale v. Grant*, 8 Q. B. D. 600.

however, *Davies v. McVeagh*, 4 Ex. D.

spatch, according to the custom, the jury were to find for the defendants. (u) When neither the shipowner nor the charterer is to blame for delay, the number of days runs from the time when the ship is in a dischargeable state; and if no period is mentioned, the cargo is to be discharged in a reasonable time, to commence from the time when the ship is in a state to begin delivering. (v) Where £5 *per diem* demurrage was stipulated to be paid, "to reckon from the time of the vessel being ready to unload and in turn to deliver," it was held that the words "in turn to deliver" applied to the public rules and regulations of the port of discharge, and that the charterers were not liable for the payment of demurrage until their "turn to deliver" had come, in conformity with the regulations of the port. (x) If after the loading has been completed the vessel is detained by a sudden frost, (y) or by foul weather and contrary winds, no right to demurrage arises by reason of such detention. (z)

The days mentioned in the clause of demurrage are understood, it is said, by the custom of the port of London, to be working days, and do not, consequently, include Sundays and Custom House holidays. (a) There does not, however, appear to be any general custom to this effect. (b) The lay days allowed are moreover to be reckoned from the time of the ship's arrival at the usual place of discharge, and not from her arrival at the entrance of the port, although for the purposes of navigation she may have discharged a portion of her cargo at the entrance of the port. (c) It is competent for the consignee to show that there is a custom at the port of unloading that the lay days commence at some particular period. (d) If the parties by mutual consent substitute a new port for the port mentioned in the

(u) *Postlethwaite v. Freeland*, 4 Ex. D. 155; 5 Ap. Cas. 599.

(v) *Brown v. Johnson*, 1 Car. & Marsh. 440; 10 M. & W. 331.

(x) *Robertson v. Jackson*, 2 C. B. 412; 15 L. J. C. P. 28; *Taylor v. Clay*, 9 Q. B. 713; *Leidemann v. Schultz*, 14 C. B. 51; 23 L. J. C. P. 17; but see *Lawson v. Burness*, 1 H. & C. 396.

(y) *Pringle v. Mollett*, 6 M. & W. 83.

(z) *Jamieson v. Laurie*, 6 Bro. P. C. 474.

(a) *Cochran v. Retberg*, 3 Esp. 121.

Where "despatch-money" was to be paid on any time saved in loading, 10s. per hour, and nine days were saved, it was held that these days were twenty-four hours each, not twelve. *Laing v. Hollway*, 3 Q. B. D. 437.

(b) *Brown v. Johnson*, 10 M. & W. 334.

(c) *Brereton v. Chapman*, 7 Bing. 559; *Kell v. Anderson*, 10 M. & W. 498; *Bastifell v. Lloyd*, 1 H. & C. 388; 31 L. J. Ex. 413.

(d) *Norden Steamship Co. v. Dempsey*, 1 C. P. D. 654.

contract of affreightment, the freighter will be entitled to the lay days, and the shipowner to the demurrage, stipulated for by the original contract. (e) In the case of demurrage, a fraction of a day counts as a day. (f) If a consignee accepts goods [*513] under a bill of lading, at the bottom of which * is a memorandum to the effect that the ship is to be cleared within a certain time, and that demurrage, at the rate of so much *per diem*, is to be paid after that day, he will be liable for the payment of such demurrage, and may be sued therefor by the master; (g) but he is not responsible to the master for demurrage if no such clause is contained in the bill of lading, (h) or if the delay is caused by the master's improperly refusing to deliver the whole cargo. (i) Where by the bill of lading the vessel is to be unloaded in her regular turn, the consignor is liable for her detention beyond her regular turn, although there is no express contract for demurrage in the bill of lading. (k)

Where the phrase in the charter-party is general, viz., "the charterer's liability to cease when the cargo is shipped," this includes all liability as well past as future; (l) but where the clause was that the liability should cease "as soon as the cargo is shipped, loading excepted," it was held that the charterer was liable for delay in loading. (m) Where the stipulation is that the ship is to be brought to a particular place, "or as near thereto as she may safely get," this refers to any permanent obstacle, as well as to anything endangering her safety. (n)

It is not unusual for the charter-party to give the shipowner a lien on the cargo for demurrage, and to provide that the charterer's responsibility is to cease on shipment of the cargo. Such

(e) *Jackson v. Galloway*, 6 Sc. 792.

(f) *Commercial Steamship Co. v. Boulton*, L. R. 10 Q. B. 346.

(g) *Jessen v. Solly*, 4 Taunt. 54; *Stindt v. Roberts*, 17 L. J. Q. B. 166; 12 Jur. 518; *Wegener v. Smith*, 15 C. B. 285; 24 L. J. C. P. 25.

(h) *Brouneker v. Scott*, 4 Taunt. 1; *Smith v. Sieveking*, 5 Ell. & Bl. 589; 24 L. J. Q. B. 257; *Chappel v. Comfort*, 10 C. B. N. s. 802; 31 L. J. C. P. 58.

(i) *Young v. Moeller*, 5 Ell. & Bl. 762; s. c. nom. *Möller v. Young*, 25 L. J. Q. B. 94.

(k) *Cawthron v. Trickett*, 15 C. B. N. s. 754; 33 L. J. C. P. 182; and see *Shadforth v. Cory*, 32 L. J. Q. B. 379.

(l) *Bannister v. Breslauer*, *infra*; *Kish v. Cory*, L. R. 10 Q. B. 553; *French v. Gerber*, 1 C. P. D. 737; 2 C. P. D. 247, C. A.

(m) *Lister v. Van Haansbergen*, 1 Q. B. D. 269.

(n) *Dahl v. Nelson*, 12 Ch. D. 568; C. A.; 6 Ap. Cas. 38. See *Capper v. Wallace*, 5 Q. B. D. 163.

an agreement is, of course, binding, and if that is the intention of the parties as collected from the instrument, will relieve the charterer from responsibility for demurrage at the port of loading as well as at that of discharge. (*o*) But such a construction should not be adopted unless the intention of the parties is quite clear; for the safer and juster conclusion in the case of doubt is that it absolves the charterer, when once cargo of sufficient value is on board, from all liabilities, which but for it he might incur in respect of anything happening after the sailing of the ship, or, more properly speaking, after the bill of lading is given, as it were, to replace the charter-party. (*p*) And even where the charterer is * discharged, it does not [* 514] necessarily follow that the responsibility is transferred to the holder of the bill of lading. (*q*)

Primage and Average.—The freighter whose merchandise has been conveyed to the port of destination is also liable for the payment of certain customary charges called *primage* and *average*. The first is a small customary payment to the master for his trouble, and the second consists of several petty charges, such as *towage*, *beaconage*, *pilotage*, &c. (*r*)

General Average and Contribution.¹—By the ancient laws of

¹ 2 Pars. Contr. (6th ed.) 323–332; Pars. Shipp. & Adm. c. 9; Dixon, Gen. Av.; Roberts, Adm. & Pr. c. 6; U. S. Dig. tit. *Shipping*, sect. 914; Abb. Nat. Dig. tit. *Average*; also ib. tit. *Shipping*.

(*o*) *Bannister v. Breslauer*, L. R. 2 C. P. 497; *Kish v. Cory*, L. R. 10 Q. B. 553; *Sanguinetti v. Pacific Steam Nav. Co.*, 2 Q. B. D. 238.

(*p*) *Brett, J., Gray v. Carr*, L. R. 6 Q. B. 522, 537; *Cristoffersen v. Hansen*, L. R. 7 Q. B. 569; *Lockhart v. Falk*, L. R. 10 Ex. 132.

(*q*) An intention to charge the holder of the bill of lading with demurrage at the port of loading was held not to be expressed in *Smith v. Sieviking*, 4 E. & B. 945; 24 L. J. Q. B. 257, by the words “paying for the said goods as per charter-party.” The words “paying freight as per charter-party,” were held in *Chappel v. Comfort*, 10 C. B. n. s. 802; 31 L. J. C. P. 58, not to make the holder of the bill of lading liable for demurrage at the port of discharge; and in

Fry v. Chartered Bk. of India, L. R. 1 C. P. 689, not to make the holder of the bill of lading of a part of the cargo liable for the entire freight. In *Wegner v. Smith*, 15 C. B. 285; 24 L. J. C. P. 25, words making the goods “deliverable to order against payment of the agreed freight and other conditions as per charter-party,” were held to make the consignee liable for demurrage at the port of delivery; *Kern v. Deslandes*, 10 C. B. n. s. 205; 30 L. J. C. P. 297; the words “paying freight for the said goods as usual,” were held to introduce a claim of lien from the charter-party into the bill of lading; but this case has been doubted; *per Brett, J., Gray v. Carr*, L. R. 6 Q. B. 540.

(*r*) *Abbott*, 404; *Pothier (Avaries)*, No. 147.

the Rhodians, it was provided that if several persons had laden goods on board a ship to be carried for hire, and the goods of one of them were thrown overboard in a storm to lighten the vessel and save her from perishing, the loss incurred for the sake of all should be made good by the contribution of all. (s) This equitable rule of law was adopted by the Romans, and has been introduced into the maritime code of Continental Europe. It is said to have been engrafted upon our own common law by the Normans, and has certainly existed as a custom amongst merchants in this country from a very early period. The obligation to contribute, which is deemed by the common law to be tacitly entered into by the shipowners and owners of the cargo, is called general or gross average; and the parties subject thereto are bound to contribute ratably according to the value of their several proportions of the property saved. The law of contribution is thus explained by Domat in his Treatise on the Civil Law:—"When, in order to lighten a ship in peril of shipwreck, part of the cargo is cast into the sea, and the ship by that means is saved, this loss is common to all those who have anything to lose in that peril. Thus the master of the ship, all those whose merchandise or effects have been saved, and those whose goods have been thrown overboard, will each bear their share of the loss, in proportion to the share they had in the whole.

[*515] If, for example, the ship and the whole * cargo were worth 100,000 crowns, and that which was cast overboard was worth 20,000 crowns, the loss being a fifth, each will contribute a fifth part of the value of what he has saved, which will make in all 16,000 crowns; and by this contribution, those who lost the 20,000 crowns, in recovering 16,000 will remain losers only of a fifth part, like the rest." (t)

Everything saved pays contribution according to its value; the shipowner contributes in proportion to the value of the ship and furniture, except the provisions of the passengers and crew, (u) and the passengers and owners of goods shipped on board in proportion to the value of the property they save,

(s) Dig. lib. 14, tit. 2, lex 1, De lege Rhodia; Pothier, Traité des Avaries, Partie 2, ed. Dupin, 371; Code de Commerce, liv. 2, tit. 11, Des Avaries.

(t) Domat, Les Loix Civiles, liv. 2, tit. 9 sects. 2, 6.

(u) Brown v. Stapyleton, 4 Bing. 119.

excepting the clothes on their backs, but not excepting their wearing apparel and jewels deposited on board. (*x*) The freight and earnings of the ship, after deducting the wages of the master and crew and other expenses of the voyage, likewise form the subject of contribution and general average; and if a ship be chartered out and home for one entire and indivisible sum for the use of the ship out and home, the entire freight for the outward and homeward voyage must, when ultimately earned, contribute to the loss, whether the loss has occurred upon the outward or the homeward voyage. (*y*) Goods stowed upon the deck of the vessel, and thrown overboard during a storm, are excluded from the benefit of general average and contribution. Where a deck cargo was loaded on deck with the consent of the cargo-owner on a general ship, and there was no alleged custom bearing upon the case, (*z*) the other cargo owners were held not liable as for general average in respect of jettison of the deck cargo. (*a*) If goods are so loaded without the consent of the cargo-owner, the shipowner is himself liable, (*b*) and if it is agreed between the cargo-owner and the shipowner that a deck cargo shall be carried, and the shipowner and cargo-owner get the whole of the benefit from the jettison, it seems the shipowner is liable. (*c*)

To establish a claim for general average, it must be shown that the goods were thrown overboard in a moment of distress and danger with a view of preserving the ship and cargo; if they have been washed out of the ship by the violence of the waves, or have been damaged or destroyed by lightning or tempest, or have been unnecessarily cast overboard by the master or crew or passengers, the loss will not support a claim for general average. (*d*) If the * masts and cables of [*516] the vessel have been cut away for the purpose of pre-

(*x*) Pothier, *Avaries*, art. 3; by the civil law, wearing apparel was made to contribute towards the general average; Dig. lib. 14, tit. 2, lex 2, sect. 2.

(*y*) *Williams v. Lond. A. Co.*, 1 M. & S. 325.

(*z*) See *Miller v. Titherington*, 30 L. J. Ex. 217; 31 L. J. Ex. 363.

(*a*) *Wright v. Marwood*, 7 Q. B. D. 62.

(*b*) *Ib.*; this case practically overrules *Milward v. Hibbert*, 3 Q. B. 120.

(*c*) *Ib.*; *Johnson v. Chapman*, 19 C. B. N. s. 563.

(*d*) *Mouse's case*, 12 Co. 63; *Dobson v. Wilson*, 3 Campb. 486; Pothier, Part 2, sect. 2, art. 1.

venting shipwreck, the owners of the cargo must contribute towards the loss of the shipowner; but if they are blown away or injured in consequence of the necessity of carrying a great and unusual press of canvas to escape a threatening danger, or if the ship was not seaworthy at the commencement of the voyage, and the loss was occasioned by reason of such unseaworthiness, the loss is not the subject of contribution and general average. (e) If a mast is cut away with a view to saving the whole adventure, but at the time when it is cut away it is certain to be lost in any event, then there is no "sacrifice" of the mast, and therefore no claim for general average. (f) If a ship accidentally runs foul of another ship in a fog or storm, and the master is compelled to cut away his rigging in order to preserve the ship and cargo, and is obliged to put into port to repair and renew that which has been sacrificed, the expense of re-landing and warehousing the cargo, of pilotage, and of the repairs, so far as they are absolutely necessary to enable the cargo to be forwarded, form the subject of general average. (g) In order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one, exposed to a common jeopardy; but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money worth were thrown away. It is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off. (h) If part of the cargo has been taken out and put into lighters, to enable a stranded vessel to be got afloat and sent into port for repairs, the whole expense of the operation, which is for the common benefit of ship, goods, and freight, forms

(e) *Birkley v. Presgrave*, 1 East, 220; *Covington v. Roberts*, 5 B. & P. 379; *Power v. Whitmore*, 4 M. & S. 149; *Schloss v. Heriott*, 14 C. B. N. s. 59; 32 L. J. C. P. 211; Dig. lib. 14, tit. 2, lex 3, lex 5; Domat, liv. 2, tit. 19, sect. 2, 11.

(f) *Shepherd v. Kottgen*, 2 C. P. D. 585, C. A.

(g) *Plummer v. Wildman*, 3 M. & S.

482, qualified by *Hallett v. Wigram*, 9 C. B. 601; 19 L. J. C. P. 283; *Hall v. Janson*, 4 Ell. & Bl. 508; *Harrison v. Bank of Australasia*, L. R. 7 Ex. 39; 41 L. J. Ex. 36; *Attwood v. Sellar*, 5 Q. B. D. 286, C. A.

(h) *Per Blackburn, J., Kemp v. Halliday*, 6 B. & S. 723; 34 L. J. Q. B. 233.

the subject of general average; (*i*) but not, as a general rule, expenses incurred after the cargo has been safely discharged and warehoused for the purpose of saving the ship alone. (*k*) So long as the expenditure by the shipowner is merely such as he should incur in the fulfilment of his ordinary duty as shipowner, it cannot be general average; but the expenditure in raising a submerged * vessel with cargo is extraordinary expenditure, and is, if incurred to save the cargo as well as the ship (which *prima facie* is the object of such an expenditure), chargeable against all the subjects in jeopardy saved by this expenditure. (*l*) So also the expense of hiring extra hands to pump, (*m*) and the burning of spars and cargo as fuel for the engine to work the pump, (*n*) and throwing water on the cargo in case of fire, (*nn*) have been held to be general average.

The American courts have enlarged the limit of general average, and have included within description of extraordinary expenses incurred for the common benefit, the expenses of repairs rendered necessary by extraordinary perils, and made at an intermediate port for the purpose of prosecuting the voyage. (*o*)

If it is necessary to lighten the ship to enable her to get into a port of safety, and a portion of the cargo is taken out for the purpose and put into lighters, and the lighters perish ere they reach the shore, the loss will be common, and the owners of the residue of the cargo must contribute thereto, as it was for the general benefit that the discharge was made. But if the ship is cast away and the lighter gets safe to port, there is then, it is said, no contribution, but each must bear his own loss. If a ship that has been saved from one danger of shipwreck by throwing some of the goods overboard is afterward sunk in another place and a portion of the cargo is recovered from the wreck, the owners of the cargo so recovered must contribute to make up the loss of those whose goods were thrown overboard for the purpose

(*i*) *Moran v. Jones*, 7 Ell. & Bl. 533; 26 L. J. Q. B. 187.

(*k*) *Job v. Langton*, 6 Ell. & Bl. 792; 26 L. J. Q. B. 97; *Walthew v. Mavrojani*, L. R. 5 Ex. 116; 39 L. J. Ex. 81.

(*l*) *Per Blackburn, J.*, *Kemp v. Halliday*, 6 B. & S. 723; 34 L. J. Q. B. 233.

(*m*) *Wilson v. Bank of Victoria*, L. R. 2 Q. B. 203.

(*n*) *Robinson v. Price*, 2 Q. B. D. 295.

(*nn*) *Whitcross Wire Co. v. Savill*, 8 Q. B. D. 653.

(*o*) *Bovill, C. J.*, *Walthew v. Mavrojani*, *supra*.

of avoiding the first peril, as the goods recovered might then have perished but for the sacrifice of the things thrown overboard to escape it. But if he whose goods were thrown overboard at first happens afterward to recover them, he shall not contribute towards the subsequent loss, as that loss has in no wise contributed to the safety of the goods so recovered. If by reason of a jettison of goods some portions of the residue of the cargo have been exposed and injured, this injury must, by the civil law, be made good by contribution. The owner of the damaged goods himself contributes towards the total loss according to the actual value of such goods after the injury, and is then entitled to contribution in respect of his own partial loss. (*p*)

Salvage paid to recaptors, money or goods given as a composition to pirates to save the rest, and expenses incurred in reclaiming the ship or defending a suit in a foreign court of [*518] *admiralty, and obtaining her discharge from an unjust capture or detention, are all the proper subjects of general contribution. (*q*) It has been held that the expenditure of ammunition in resisting capture by a privateer, the damage done to the ship in the combat, and the expense of curing the wounded, are not the subject of contribution and general average. The correctness of this decision, however, may be doubted, opposed as it is to the opinions of some of the most eminent writers on maritime law, and to the acknowledged principle of contribution. (*r*) "A practice formerly prevailed in this country to value the goods at their invoice price or prime cost if the loss happened before half the voyage was performed; but if it happened afterward, then to value the goods at the clear price which they would have fetched at the place of destination. The last valuation is now adopted in all cases where the average is adjusted after the ship's arrival at the place of destination. But if the ship is compelled to return to its port of lading, and the average is immediately adjusted, the goods only contribute according

(*p*) Dig. lib. 14, tit. 2, lex 4, sects. 1, 2, 7; Domat, liv. 2, tit. 9, sect. 14 (*Avaries*), No. 145; Pothier, Des Avaries, art. 4.

(*q*) Marshall on Insurance, 4th ed., by Mr. Justice Shee, p. 425, the leading principle is thus stated: "Omnium con-

tributioni sarciatur, quod pro omnibus datum est."

(*r*) Taylor v. Curtis, 6 Taunt. 608; ib. 638-643; Phillips on Insurance, 337; Benecke, 280; Pothier (*Avaries*), sect. 2, No. 144.

to the invoice price," (s) or even less, if in all probability they would have arrived in a damaged state; the general rule being that the value of goods jettisoned is to be taken to be the sum which it may fairly be assumed they would have been worth to the owner at the port of adjustment. (t) As soon as the average has been calculated and the exact amount of contribution ascertained, an action may be brought for its recovery. (u)

Where there has been a general average loss, the shipowner must take such steps as are necessary upon his part to procure an adjustment of the general average and secure its payment. (x)

Transfer of Bills of Lading.¹—The contract evidenced by a bill of lading is transferred by the indorsement and delivery of the instrument to the indorsee, so as to enable the latter to maintain an action or be sued upon it. (y) If the consignor under a bill of lading making the goods deliverable to order or assigns, indorses the bill in blank and deposits it as a security for an advance of money, and on re-payment of the advance the bill is re-indorsed and re-delivered to him, he is remitted to all his *rights under the original contract as [*519] against the shipowners, and may sue them for a breach, whether occurring before or after the re-indorsement. (z)

Damages for Breach of Charter-parties.—The measure of damages for the breach of the ordinary contract or covenant in a charter-party to procure and ship a cargo and pay freight, (*ante*, p. *482) is to be ascertained by calculating the freight to be earned, and deducting the expense which the shipowner would have been put to, but did not incur, in earning it, and also what the ship earned (if anything) during the period which

¹ 2 Dan. Negot. Inst. (3d ed. 1882), c. 54; Abb. Nat. Dig. tit. *Bills of Lading*; Shaw v. Railroad Co., 101 U. S. 557; Robinson v. Memphis, &c. R. R. Co., 9 Fed. Reporter, 129; The L. J. Farwell, 8 Biss. 61; and see *ante* *p. 482, American note 2.

(s) Abbott, *Contribution*.

(t) Fletcher v. Alexander, L. R. 3 C. P. 375; 37 L. J. C. P. 193.

(u) Birkley v. Presgrave, 1 East, 220. See the form of declaration, Schloss v. Heriot, 14 C. B. N. s. 59; 32 L. J. C. P. 214.

(x) Crooks v. Al'an, 5 Q. B. D. 38.

(y) 18 & 19 Vict. c. 111; see Dra-

cachi v. Anglo-Egyptian Navigation Co., L. R. 3 C. P. 190; Smurthwaite v. Wilkins, 13 C. B. N. s. 842; 31 L. J. C. P. 214; The Figlia Maggiore, L. R. 2 A. & E. 106; 37 L. J. Adm. 52; The Freedom, L. R. 3 P. C. 394; 24 Vict. c. 10, sect. 6.

(z) Short v. Simpson, L. R. 1 C. P. 248; 35 L. J. C. P. 147.

would have been occupied in performing the voyage if the charter-party had been fulfilled. (a) If subsequently to the breach of contract the shipmaster has been offered a cargo and has refused it, or has neglected an opportunity of receiving cargo and earning freight, the measure of damages will be the amount of freight agreed to be paid, minus what the shipmaster might have earned if he had thought fit. (b) When goods shipped on board have been sold at an intermediate port to defray expenses necessarily incurred in repairing the vessel, the shipper is not entitled to claim the price they might have realized at the port of delivery, unless the ship and cargo arrive there in safety. (c)

Restrictions on the Carriage of Dangerous Goods.¹—By the 36 & 37 Vict. c. 85, sect. 25, the master or owner of any vessel may refuse to take on board any package or parcel which he suspects to contain goods of a dangerous nature, and may require it to be opened to ascertain the fact. By sect. 26, where any dangerous goods, (d) or any goods which in the judgment of the master or owner of the vessel are of a dangerous nature, have been sent or brought aboard any vessel without being marked or without notice being given as required by the act, (e) the master or owner of the vessel may cause such goods to be thrown overboard, together with any package or receptacle in which they are contained; and neither the master nor the owner of the vessel will be subject to any liability in respect of such throwing overboard.

Carriage of Passengers and Merchandise by Land by Parties not being Common Carriers.²—**Injuries to Passengers and Goods.**

¹ U. S. Rev. Stat., sects. 4278, 4279, 4288, 4422, 4424, 4472, 4475, 4476, 5353-5355; Boston, &c. Ry. Co. v. Shanly, 107 Mass. 568; Furth v. Forster, 7 Robt. 484; Wilkie v. Bolster, 3 E. D. Smith, 327; Barney v. Burstenbinder, 7 Lans. 210; The Nitro-Glycerine Case, 15 Wall. 524; see *ante*, *p. 419, American note.

² Upon transportation by railroad, see Pierce, Railroads (2d ed. 1881); Red-

(a) Smith v. M'Guire, 3 H. & N. 567; 27 L. J. Ex. 465; Wilson v. Hicks, 26 ib. 242.

(b) Harries v. Edmonds, 1 C. & K. 686.

(c) Atkinson v. Stephens, 21 L. J. Ex. 333.

(d) That is, aquafortis, vitriol, naphtha, benzine, gunpowder, lucifer matches, nitro-glycerine, petroleum, or any

other goods of a dangerous nature, sect. 23. See also 38 Vict. c. 17, *post*, p. 527.

(e) By sect. 23, the nature of the goods must be marked on the outside of the package, and written notice of their nature and of the name and address of the sender or carrier must be given at or before the time of sending the same to be shipped, or taking the same on board the vessel.

— All persons who undertake the work of carrying passengers by * land for hire impliedly warrant their vehicles, horses, harness, and equipments to be roadworthy, in good travelling order, and reasonably secure and sufficient in strength for the accomplishment of the journey, so far as that condition of things can be secured by the exercise of skill and foresight; but the carrier does not warrant that they shall be perfect for their purpose; and, therefore, he is not responsible for a defect in the vehicle, the existence of which no skill, care, or foresight could have detected, (*f*) but he ought reasonably to examine the vehicle. (*g*) As the work of driving is a work of field, Carriers, Part I., c. 3; Redfield, Railways (5th ed. 1873); Redfield, Am. Ry. Cases.

The decisions are very conveniently reported anew in the American Railway Cases; the American Railway Reports; and the American and English Railroad Cases. See further, Lacey's R. R. Dig.; Abb. Dig. Corp. tit. *Railroads*; U. S. Dig. tit. *Railroads*; ib. *Carriers*; *Corporations*; Boone, Dig. Corp. c. 19.

Obligations, rights, and liabilities of railroad companies in respect to special cars, such as drawing-room and sleeping cars, ladies' cars, smoking-cars, cattle cars, &c. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 20 Am. L. Reg. n. s. 245, and note by J. D. Lawson, ib. 253; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; 15 Am. L. Reg. n. s. 95, and note, ib. 100; *Indianapolis, &c. R. R. Co. v. Horst*, 93 U. S. 291; *Chicago, &c. Ry. Co. v. Williams*, 55 Ill. 185; *Bass v. Chicago, &c. Ry. Co.*, 36 Wis. 450; *Pullman Palace Car Co. v. Taylor*, 65 Ind. 53; *Peck v. New York Central, &c. R. R. Co.*, 70 N. Y. 587; *Marquette v. Chicago, &c. R. R. Co.*, 33 Iowa, 562; *Thorpe v. New York Central, &c. R. R. Co.*, 76 N. Y. 402; *C. C. I. Ry. Co. v. Walrath*, 8 Cin. L. Bul. 294; *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr. n. s. 352; *Blum v. Southern Pullman Palace Car Co.*, 1 Flipp. 500, 22 Int. Rev. Rec. 305; *Pullman Palace Car Co. v. Texas, &c. R. Co.*, 11 Fed. Rep. 625, and note, ib. 632; *Pullman Palace Car Co. v. Missouri Pacific Ry. Co.*, ib. 634; *Kinsley v. Lake Shore, &c. R. R. Co.*, 125 Mass. 54; *Diehl v. Woodruff Sleeping Car Co.*, 22 Alb. L. J. 90; *Palmer v. Wagner*, ib. 149.

Upon carriage of parcels, &c. by express companies, see Abb. Dig. Corp. tit. *Express Companies*; U. S. Dig. and Ann. Dig. 1870-1878, tit. *Carriers*; ib. tit. *Express Companies*; Ann. Dig. 1879, &c., tit. *Carriers*. Later cases are: *Muser v. Holland*, 17 Blatchf. 412, 1 Fed. Rep. 382; *Caldwell v. Southern Exp. Co.*, 1 Flipp. 85; *Bank of Kentucky v. Adams Exp. Co.*, ib. 242; and on the effect of "value asked, not given," and other limitations in express receipts, *Mather v. American Exp. Co.*, 9 Biss. 293; *Muser v. Holland*, *supra*.

Upon other classes of land carriers, see Angell, Carriers (5th ed. 1877); Redfield, Carriers; Lawson, Contracts of Carriers; *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455, and note by A. C. Freeman, ib. 468; *Cole v. Goodwin*, 32 Am. Dec. 470, and note, ib. 495.

(*f*) *Burns v. Cork & Bandon Ry. Co.*, 13 Ir. C. L. R. 546; *Christie v. Griggs*, 2 Campb. 81; *Sharp v. Grey*, 9 Bing. 457; 2 M. & Sc. 620; *Readhead v. The Midland Ry. Co.*, L. R. 4 Q. B. 379; *Francis v. Cockerell*, L. R. 5 Q. B. 184; ib. 501. An overloaded coach is not roadworthy. *Israel v. Clarke*, 4 Esp. 259; *Aston v. Heaven*, 2 Esp. 535.

(*g*) *Richardson v. G. E. Ry. Co.*, L.

skill, the carrier or coach-proprietor impliedly undertakes, if he drives himself, that he is possessed of, and will exercise, competent skill and knowledge of driving. If, on the other hand, he accomplishes the work through the medium of inferior agents and servants, he impliedly undertakes to provide fit and proper persons to execute the office. If the driver overloads the carriage, or drives with immoderate speed, or with defective reins, or with reins so loose that he cannot readily command his horses, or if he passes unnecessarily along unsafe parts of the road, or through narrow gateways or dangerous passages, or takes the wrong side of the road, and a collision occurs, the proprietor of the carriage will be answerable for injuries sustained by the passengers. (*h*) And if from the negligence or recklessness of the driver, or defects in the carriage, harness, or equipments, the passenger is placed in so perilous a situation as to render it advisable for him to leap to the ground to avoid a greater peril reasonably to be apprehended, and he sustains an injury in so doing, the coach proprietor is responsible. (*i*) In determining the question of negligence in cases of collision, the law or custom of the road as to passing vehicles is to be taken into consideration; but it does not follow that a person who neglects that custom and is on the wrong side of the road when a collision takes place, is necessarily guilty of negligence. "Circumstances may frequently arise where a deviation from what is called the law of the road would not only be justifiable, but absolutely necessary." (*k*)

Carriers of passengers by railway contract that all persons connected with the carrying and with the means and appliances of the carrying, such as the carriages, the road or signalling, shall use * care and diligence; but they do not contract that other railway companies who may be entitled to use the railway shall not be guilty of negligence in the management of their trains. (*l*)

Every carrier of passengers for hire, whether he be or be not a common carrier, is bound to exercise the greatest care and fore-

R. 10 C. P. 486, reversed on the findings on appeal, 1 C. P. D. 342.

(*k*) *Wayde v. Lady Carr*, 2 D. & R. 256.

(*l*) *Wright v. Midland Ry. Co.*, L. R.

(*h*) *Aston v. Heaven*, 2 Esp. 535; 8 Ex. 137; 42 L. J. Ex. 89. As to this, *Bremner v. Williams*, 1 C. & P. 414. see *post*, p. *563.

(*i*) *Jones v. Boyce*, 1 Stark. 493.

thought for securing the safety of his passengers, and is answerable for the smallest negligence on his own part or on the part of his servants and agents, (*n*) but not for unforeseen accidents and misfortunes, which care and vigilance could not have provided against or prevented. He "does not warrant the absolute safety of his passengers. His undertaking as to them goes no farther than this, that as far as human care and foresight can go, he will provide for their safety." "When everything has been done that human prudence can suggest, an accident may happen. The lights may in a dark night be obscured by fog, the horses frightened, or the coachman may be deceived by a sudden alteration in the position of objects near the road by which he had been used to be directed in former journeys; and if, having exerted proper skill and care, he from accident gets off the road, the proprietors are not answerable for what happens from his doing so." But the breaking down or overturning of a coach is *prima facie* proof of negligence on the part of the driver, and he must rebut this presumption, if it be unfounded, by showing that "the damage arose from what the law considers a mere accident." (*n*) When the carriage is by railway, the railway company is bound to keep the railway itself in good travelling order and fit for use, and to provide roadworthy engines and carriages, skilful drivers and engineers, and all things necessary for the safe conveyance of such passengers; and by the 31. & 32 Vict. c. 119, sect. 22, to provide in certain cases for means of communication between the passengers and the guard. But the company is not bound, at its peril, to provide a roadworthy carriage, and will not be responsible to a passenger if the defect in the carriage is such that it could neither be guarded against in the process of construction, nor discovered by subsequent examination. (*o*)

If the driver of a railway-engine drives at a dangerous speed, or from negligence or unskilfulness causes the train to be thrown off the rails, or to come into collision with another train, the

(*m*) Jackson v. Tollett, 2 Stark. 38; & Sc. 620; 9 Bing. 460; Harris v. Costar, 1 C. & P. 637.

(*n*) Crofts v. Waterhouse, 11 Moore, 137; 3 Bing. 321; Sharp v. Grey, 2 M.

(*o*) Readhead v. Midland Ry. Co., L. R. 2 Q. B. 412; s. c. (Exch. Ch.), ib. 4 Q. B. 379.

railway company is responsible for all damages and [*522] injuries that may have *been sustained by the passengers. (*p*) But if a railway-train runs off the line in consequence of the wilful and malicious act of a stranger who has placed a stone on the railway, then, as there is no negligence on the part of the railway company, they are not responsible for the consequences. (*q*)

A railway company will be responsible for an injury sustained by a child between the ages of three and twelve, travelling with its mother, although no separate fare was paid for the child, at all events in the absence of fraud on the part of the mother, (*r*) and the company cannot shield itself under the contract with the mother. (*s*) The contract seems to be made by the invitation to take the seat in the train and the acceptance of it, and it is immaterial whether the traveller himself took a ticket or paid the fare. (*t*) But where a servant has taken a ticket for himself, the master cannot sue, because the tort arises out of a contract to which the master is not a party, and there is no duty towards the master. (*u*) It seems, however, that where the servant has taken a ticket from one company and has been injured by the negligence of another, the master may sue that company with whom neither has contracted. (*x*) These cases do not appear to be satisfactory; but it seems that, though generally speaking an action against a railway company for a tort in form is substantially for a breach of contract, where there is a contract express or implied between the parties, yet there is, beyond the contract, a duty which the law imposes upon all, namely to do no act to injure another. (*z*)

When the very Occurrence of a Railway Accident is prima facie Proof of Negligence.—When both the railway itself and the carriages in which the passengers are conveyed are under

(*p*) *Collett v. Lond. & N. W. Ry. Co.*, 16 Q. B. 984; *Skinner v. Lond. Br. &c. Ry. Co.*, 5 Exch. 787. C. B. 655; *Austin v. G. W. Ry. Co.*, *supra*.

(*q*) *Latch v. Rumner Ry. Co.*, 27 Law J. Exch. 155. B. N. S. 213; 34 L. J. C. P. 292.

(*r*) *Austin v. Gt. West. Ry. Co.*, L. R. 2 Q. B. 442. 48 L. J. C. P. 400, *per* Lopes, J.

(*s*) *s. c.* (*z*) *Fleming v. M. S. & L. Ry. Co.*, 4 Q. B. D. 81; *Foullses v. Met. Dist. Ry. Co.*, 4 C. P. D. 267; 5 C. P. D. 157.

(*t*) *Marshall v. Y. & N. Ry. Co.*, 11

the exclusive control of the company carrying the passengers, the very fact of a train's running off the line has been held to be *prima facie* proof of negligence on the part of such company or its officers, and throws upon them the burthen of explaining how it happened, and of showing that it occurred without any fault or neglect of duty on their part. (a) And it is not sufficient to show that other companies had running powers over their line, without *showing affirmatively that it was [*523] through the negligence of such other companies that the accident occurred. (b) But if the accident is *prima facie* caused by the negligence of some third person for whom the defendants are not responsible, *e. g.* a contractor engaged in placing iron girders over the defendant's line for some third person, it must be shown that the accident resulted from, or might not have occurred but for the defendant's omitting to take some precaution usually adopted in such cases. (c) If it appears that the train went off the rails when travelling at a moderate speed, and that the wheels of the carriages and engine were properly constructed, and the railway itself was properly made and in good order, and that the departure of the engine and carriages from the rails might have been occasioned by the malicious trespass of a stranger (*ante*, p. *522), there will be nothing to establish even a *prima facie* case of negligence against the company. (d) But if the railway bridges or viaducts have not been properly constructed, or have not been carefully maintained and repaired, so as to enable them to resist the violence of storms and floods which may be expected occasionally to occur, and injuries are thereby caused to passengers, (e) the railway company will be responsible in damages, although they may have employed competent engineers and workmen, and have used the best materials in the work. (f)

(a) *Carpue v. Lond. & Br. Ry. Co.*, 5 Q. B. 751; *Latch v. Rumner Ry. Co.*, *supra*; *Dawson v. Manch. &c. Ry. Co.*, 5 Law T. R. N. s. 682; see *Scott v. Lond. Dock Co.*, 34 Law J. Exch. 17; *ib.* 220; as to interrogatories in cases of collision, see *Beckervaise v. Gt. West. Ry.*, L. R. 6 C. P. 36.

(b) *Ayles v. South-East. Ry.*, L. R. 3 Exch. 146.

(c) *Daniel v. Metropolitan Ry.*, L. R. 3 C. P. 216; 3 *ib.* 591; 5 *Engl. & Ir. App.* 45.

(d) *Bird v. Gt. Northern Ry. Co.*, 28 Law J. Exch. 3.

(e) *Gt. West. &c. of Canada v. Fawcett*, 1 Moore's P. C. N. s. 101.

(f) *Grote v. Chester & Holyhead Ry. Co.*, 2 Exch. 255.

The 8 Vict. c. 20, sect. 68, imposes no duty on a railway company towards their passengers to keep up fences so as to prevent cattle straying from adjoining lands on to the line. Neither are the company bound, at common law, to maintain fences sufficient to keep cattle off the line under all circumstances; but they are bound to use every reasonable care to prevent them straying on the line. (*g*)

Every person who receives goods to be carried from one place to another is bound to provide tarpaulins and proper "covering to protect the goods from injury by rain." (*h*)

Loss of Goods or Money by the Way. — A person who receives things to be carried by him for hire to a certain destination cannot set up a mere loss of them by the way as an answer to an action for the non-delivery of them according to his [*524] contract (*ante*, * p. * 494). Where the plaintiff delivered to the defendant £3 to be carried to Southwark, for reasonable hire and reward, it was held that the law would imply a promise from the defendant "safely to convey" the money, although he was not a common carrier, and although no sum certain had been agreed to be paid him as the price of the carriage. (*i*) And where a traveller hired a cab for the conveyance of himself and his luggage to a railway station, and the luggage was placed on the outside of the cab, it was held that the law would imply from the acceptance of the luggage by the cabman to be carried, together with the passenger, for hire, a promise from him "safely and securely" to carry it, and that he was responsible for the loss of a portion of it by the way. (*k*) This promise to carry safely which the law implies from all persons who undertake the carriage of goods for hire, is not understood to mean that the goods shall be carried and delivered safe at all events, but that they shall be kept safe from all such hazards and contingencies as might have been foreseen and guarded against by the exercise of vigilance or skill. The contract is "a contract

(*g*) *Buxton v. North-Eastern Ry. Co.*, L. R. 3 Q. B. 549. They are bound to fence for the benefit of the occupier, so as to prevent his cattle from straying, even although the owner of the land has agreed to take money in lieu of fencing. *Corry v. G. W. Ry.*, 7 Q. B. D. 322.

(*h*) *Webb v. Page*, 6 Sc. N. R. 957; 6 M. & Gr. 204; *Walker v. Jackson*, 10 M. & W. 168.

(*i*) *Rogers v. Head*, Cro. Jac. 262; *Matthews v. Hopping*, 1 Keb. 852.

(*k*) *Ross v. Hill*, 2 C. B. 877; 15 L. J. C. P. 182.

to carry safely and securely as far as regards the neglect of the carrier himself and his servants, but not to insure the safety of the goods;" and the carrier therefore would not be liable for losses by robbers, or any taking by force; but he is *prima facie* responsible for a secret theft of them, and can only discharge himself from liability by proving his own care and watchfulness and blamelessness in the matter (*ante*, p. * 495).

Where the defendant received eleven boxes of gold dust, under a special contract to carry them and deliver them at the Bank of England, "robbers and dangers of the road excepted," and one of the boxes was secretly stolen, it was held that the defendant was responsible for the loss; that a secret theft or pilfering was not within the exception as to robbers, nor was it a danger of the road within the meaning of the contract. (*l*) If the owner accompanies the goods to take care of them, and loses them himself, the carrier is not responsible for the loss. (*m*)

Who is to be deemed a Common Carrier.¹ — Every person who plies with a carriage by land, or a boat or vessel by water, between different places, and professes openly to carry passengers and goods for hire, is a COMMON CARRIER. Such are railway companies, who profess to carry passengers, parcels, and merchandise, stage-coach and stage-wagon proprietors, lightermen, hoymen, barge-owners, * canal boatmen, and the owners "[* 525] and masters of ships and steamboats employed as general ships trading regularly from port to port for the transportation of all persons offering themselves or their goods to be conveyed for hire to the port of destination. (*n*) The owner of a cart or carriage who does not ply regularly for hire to a particular destination, but merely lets out a private carriage, with horses and driver, by the hour, day, or job, to proceed to any destination ordered by the hirer, is not a common carrier. A London cab-driver or hackney coachman, for example, is not a

¹ See *ante*, p. * 56; p. * 482, American notes; also, *Mann v. White River Log, &c. Co.*, 46 Mich. 38; *The James Jackson*, 9 Fed. Reporter, 614.

(*l*) *De Rothschild v. R. M. St. P. Co.*, 7 Exch. 734; 21 L. J. Ex. 273.

(*m*) *Brind v. Dale*, 8 C. & P. 209, 211; 2 M. & Rob. 80; see also cases as to passengers' luggage, *post*, p. * 544.

(*n*) *Lovett v. Hobbs*, 2 Show. 127; *Robinson v. Dunmore*, 2 B. & P. 416; *Laveroni v. Drury*, 8 Exch. 166; *Crouch v. Lond. & North-West. Ry. Co.*, 23 L. J. C. P. 73.

common carrier; (o) nor is a furniture-remover; (oo) but a barge-owner is, although he does not ply between any fixed *termini*, and only lets his barges for a single voyage to one person at a time, if he lets out his vessels for the conveyance of the goods of any person who applies to him. (p) Railway companies are, apart from statute law or special contract, common carriers, and the Railway Clauses Act, 1845, (q) provides that they shall not be liable to any greater extent than common carriers; but their rights and liabilities are further regulated and limited, as we shall see, both by statute and by special contracts. It is the duty of all who hold themselves out to the world as common carriers to carry, for every person who tenders them the proper charge, all goods which they have convenience for carrying, and in respect of which they hold themselves out as carriers, without subjecting the person tendering the goods to any unreasonable or unusual conditions. (r) By many of the railway acts it is expressly enacted that railway companies shall act as common carriers, that they shall convey passengers and goods by locomotive engines, and that they shall provide for all persons conveying and sending goods by their railway every reasonable convenience and facility for the loading and unloading of goods. (s)

Duties of the Common Carrier.¹—Every common carrier is bound to accept and carry all such things as he publicly pro-

¹ Common carrier must carry impartially, but cannot be compelled to do so by mandamus; the remedy is by action for damages. *People v. New York Ry. Co.*, 12 Cent. L. J. 108, and note by J. D. Lawson, *ib.* 110; *Graham v. Chicago, &c. Ry. Co.*, 53 Wis. 473.

Respecting obligation to carry passengers impartially, see as to colored persons, *Railroad Co. v. Brown*, 17 Wall. 445; U. S. Rev. Stat. sects. 1977, 1978; Act of March 1, 1875, c. 114, 18 Stat. at L. 336; *Hall v. De Cuir*, 95 U. S. 485; *Brown v. Memphis, &c. R. R. Co.*, 7 Fed. Reporter, 51, 4 *ib.* 37; *Gray v. Cincinnati Southern Ry. Co.*, 11 Fed. Reporter, 683; and as to intoxicated or disorderly persons, gamblers, persons diseased, &c., see *Thurston v. Union Pacific R. R. Co.*, 4 Dill. 321; *Hendricks v. Sixth Ave. R. R. Co.*, 44 N. Y. Superior Ct. 8; *Railway Co. v. Valleley*, 32 Ohio St. 345; *Philadelphia R. R. Co. v. Larkin*, 47 Md. 155;

(o) *Brind v. Dale*, 8 C. & P. 207;
Ross v. Hill, 2 C. B. 887; 15 Law J. C.
 P. 182.

(oo) *Scaife v. Farrant*, *post*, p. *540.

(p) *Liver Alkali Co. v. Johnson*, L.
 R. 9 Ex. 338; 43 L. J. Ex. 216.

(q) *Post*, p.

(r) *Garton v. Brist. & Ex. Ry. Co.*,
 1 B. & S. 162; 30 L. J. Q. B. 294.

(s) *Pegler v. Monm. Ry. &c. Co.*, 6
 H. & N. 644; 30 L. J. Ex. 249.

fesses to carry, for all persons who are ready and willing to pay him his customary hire, provided he has room in his cart or carriage for their conveyance, and has declared his intention to set out on his accustomed journey. (*t*) He is bound to carry them to and from the places to which he professes to carry, although one of those places may be without the realm; (*u*) for whenever a man * undertakes the public office or profession of a common carrier of goods, he undertakes a public trust for the benefit of the rest of his fellow-subjects, and is bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him. (*x*) A carrier is not bound to carry goods by the shortest route, but only by the route by which he usually carries them, and which he professes to go. (*y*) If he journeys by a particular roundabout road between one place and another, he is not bound to carry by a shorter route; but he is bound to use reasonable despatch, and to deliver within a reasonable time. (*z*) If he limits his enterprise and business to the carriage of particular classes of merchandise or chattels, he can only be compelled to carry the things he publicly professes to carry and is in the habit of carrying. If the carriage of certain commodities is attended with inconvenience or some peculiar risk, he may refuse to receive and carry such articles as a common carrier, (*a*) but may nevertheless accept and carry them under a special con-

Pittsburg, &c. R. R. Co. *v.* Vandyne, 57 Ind. 576; Milliman *v.* New York Central, &c. R. R. Co., 66 N. Y. 642; The Hammonia, 10 Ben. 512.

Unusual accumulation of freight waiting to be forwarded does not excuse delay; see Keeter *v.* Wilmington, &c. R. R. Co., 86 N. C. 346; also Harrison *v.* Missouri Pacific Ry. Co., 74 Mo. 364.

Delay or loss caused by interference of mobs. Pittsburg, &c. Ry. Co. *v.* Hollowell, 65 Ind. 188; Hall *v.* Pennsylvania R. R. Co., 19 Am. L. Reg. n. s. 250, 1 Fed. Reporter, 226; Wertheimer *v.* Pennsylvania R. R. Co., 1 Fed. Reporter, 232, 17 Blatchf. 421; Pittsburg, &c. Ry. Co. *v.* Hazen, 84 Ill. 36.

(*t*) Bac. Abr. *Carriers* (B); Pickford *v.* Grand Junction Ry. Co., 8 M. & W. 372.

(*u*) Crouch *v.* Lond & North-West. Ry. Co., 14 C. B. 290; 23 Law J.C. P. 73.

(*x*) Keilwey, 50, pl. 4.

(*y*) Per Willes, J., Myers *v.* Lond. & South-West. Ry., L. R. 5 C. P. 3.

(*z*) Hales *v.* Lond. & N. W. Ry. Co., 4 B. & S. 66; 32 L. J. Q. B. 292; *In re* Oxlade *v.* The North-Eastern Ry. Co., 15 C. B. n. s. 680.

(*a*) Johnson *v.* Mid. Ry. Co., 4 Exch. 371; McManus *v.* Lanc. & York. Ry. Co., 4 H. & N. 327; 28 L. J. Ex. 353.

tract, throwing the risk of damage to them from ordinary accidents during the transit upon the owner or the consignor. (*b*) In the absence of a contract to deliver at a particular time, the duty of a common carrier is to deliver at a reasonable time, looking at all the circumstances of the case; and since his first duty is to carry safely, he is justified in incurring delay, if delay is necessary to secure the safe carriage. (*c*) He is not responsible for the consequences of delay arising from causes beyond his control. Where, therefore, the defendants, a railway company, were prevented by an unavoidable obstruction on their line from carrying the plaintiff's goods within the usual time, and the obstruction was caused by an accident resulting solely from the negligence of another company, who had, under an agreement with the defendants, sanctioned by act of parliament, running powers over their line, it was held that the defendants were not liable to the plaintiff for damage to his goods caused by the delay. (*d*)

As regards dogs and live animals, if the carrier does not by his public profession and practice undertake to carry [* 527] them, he * may decline to receive and carry them except upon certain special conditions, and under a special contract regulating and defining the nature and extent of his liability. (*e*) But in the case of a railway or canal company, the conditions or special contract must be just and reasonable, must not exempt the company from liability for their own neglect or default, and must be in writing signed by the consignor or his agent. (*f*) Where carriers by sea give public notice that they receive goods for shipment on the condition and agreement only of the ship sailing under a bill of lading in the form ordinarily adopted, they are not bound to receive and carry otherwise than in accordance with their published terms. (*g*)

(*b*) *Peek v. North Staff. Ry. Co.*, 32 L. J. Q. B. 241; *Phillips v. Edwards*, 28 L. J. Ex. 52; 3 H. & N. 813; *Austin v. Manch. Ry. Co.*, 16 Q. B. 600; 10 C. B. 454; *Carr v. Lanc. & York. Ry. Co.*, 7 Exch. 707; *Martin v. Gt. Indian Penn. Ry.*, L. R. 3 Exch. 9.

(*c*) *Taylor v. Great Northern Ry. Co.*, L. R. 1 C. P. 385; 35 L. J. C. P. 210.

(*d*) *Taylor v. Great Northern Ry. Co.*, *supra*.

(*e*) *Harrison v. Lond. & Br. Ry. Co.*, 29 L. J. Q. B. 218; 31 L. J. Q. B. 113; 2 B. & S. 122.

(*f*) 17 & 18 Vict. c. 31, sect. 7; *post*, p. * 555.

(*g*) *Phillips v. Edwards*, *ante*, p. * 526; *Wilton v. Royal Atlantic Mail St.*

The mere posting up at a particular railway station of a list of tolls taken by the company for the carriage of coals, amongst other things, will not constitute the company common carriers of coals from that particular station, if it appears that they have no accommodation there for receiving coals, and do not, in point of fact, carry them from that spot, although they carry them over other parts of their line. (*h*)

By the 38 Vict. c. 17, the carriage of dangerous goods is regulated. (*i*) If a carrier is employed to carry an article of such a dangerous nature as to require extraordinary care in its conveyance, the fact must be communicated to him, or the consignor will be responsible for any injury that may result to the carrier or his servants from the want of such communication. (*k*)

The Privy Council may make orders on persons carrying animals for hire, to cleanse and disinfect the vessels, vehicles, &c., used for such purpose. (*l*) Every railway company is also bound, on the written request of the consignor or person in charge of any animals carried by them, to provide the animals with food and water at such stations as the Privy Council may direct, and will have a lien for the reasonable expense of supplying such food and water on the animals so supplied, and also on any other animals carried for the same consignor. (*m*)

Every common carrier of passengers with luggage is bound to take the customary quantity of luggage with each passenger, * consisting of such things as a traveller, accord- [*528] ing to the wants of the class to which he belongs, usually carries with him for his own personal convenience, either with reference to the immediate necessities or to the ultimate purpose of the journey; but he is not bound to carry merchandise or articles wholly unconnected with luggage, unless he pro-

Packet Co., 10 C. B. N. S. 453; 30 L. J. C. P. 369.

(*h*) *Oxlade v. North E. Ry. Co.*, 15 C. B. N. S. 680; *Johnson v. Mid. Ry. Co.*, 4 Exch. 372.

(*i*) Harbor authorities and railway and canal companies may make by-laws as to the carriage, sects. 34, 35, and the Secretary of State as to other carriers, sect. 37. As to specially dangerous ex-

plosives, see sect. 43; and as to exemption of carrier where consignor or consignee is in fault, sect. 88.

(*k*) *Farrant v. Barnes*, 11 C. B. N. S. 553; 31 L. J. C. P. 137.

(*l*) 41 & 42 Vict. c. 74, sect. 32, xxi. sect. 62; see *Cox v. Gt. East. Ry. post*, p. * 491.

(*m*) 41 & 42 Vict. c. 74, sect. 33, xii., sects. 66, 5.

fesses to carry merchandise, or unless the traveller tenders or is ready to pay the customary hire for merchandise ; (*n*) or unless the carrier knows the luggage is merchandise. (*nn*) Deeds and money carried by an attorney in his portmanteau for use in the causes in which he may be engaged are not "ordinary luggage" for which a railway company is responsible, (*o*) nor is a child's rocking-horse, (*p*) nor sheets and blankets intended for the use of the passenger's household when permanently settled ; (*q*) but a chronometer is, it seems, luggage for a master mariner. (*r*)

Of the Public Profession of Railway Companies made through the Medium of their Time-Tables.—A railway company by the publication of a time-table represents that a train will run at or about the time specified, and the company will be responsible in damages to all who tender themselves for conveyance at the appointed time and find that no train at all has been provided ; (*s*) but railway companies do not by their time-tables guarantee the arrival of their trains at intermediate stations, or their departure from them, at the exact time fixed. All they undertake to do is to carry the passenger without any unreasonable and unnecessary delay. (*t*) But the sticking up of a table of tolls at the different stations does not imply that the company carries all the things mentioned therein from each station. (*u*) The mere taking of a ticket is not sufficient evidence of a contract to convey a passenger to a certain place within a given time ; the time-bills must be produced to prove the contract. (*x*)

Booking Places in Coaches.—If four ladies, wishing to travel together, take "the whole inside of a coach," the coach-proprietor and his servants have no right to separate them, and do not

(*n*) *Great Northern Ry. Co. v. Shepherd*, 8 Exch. 30; 21 Law J. Exch. 114; as to passengers' luggage generally, see *post*, p. * 544.

(*nn*) *Cahill v. L. & N. W. Ry. Co.*, 10 C. B. N. s. 154; 31 L. J. C. P. 271.

(*o*) *Phelps v. Lond. & North-West. Ry. Co.*, 34 Law J. C. P. 259.

(*p*) *Hudston v. Midland Ry.*, 38 L. J. Q. B. 213; L. R. 4 Q. B. 366.

(*q*) *Macrow v. Gt. Western Ry., L. R.* 6 Q. B. 612.

(*r*) *Le Conteur v. Lond. & South-West. Ry. Co., L. R.* 1 Q. B. 54.

(*s*) *Denton v. Gt. North. Ry. Co.*, 5 Ell. & Bl. 868; 25 L. J. Q. B. 129. Two of the judges thought there was a contract, and all three that there was a tort.

(*t*) *Hurst v. Gt. West. Ry. Co.*, 19 C. B. N. s. 310; 34 L. J. C. P. 264.

(*u*) *Oxlade v. North-East. Ry. Co.*, 15 C. B. N. s. 680; 33 Law J. C. P. 171.

(*x*) *Hurst v. Gt. West. Ry. Co.*, 34 Law J. C. P. 265; and see *Robinson v. Gt. West. Ry. Co.*, 35 Law J. C. P. 123.

fulfil their contract by furnishing a double-bodied coach, and tendering three inside places in one division and one in the other. (y) “If a person takes a place in a stage-coach, and pays at * the time only a deposit, as half the fare, [* 529] for example, and is not at the inn ready to take his place when the coach is setting off, the coach-proprietor is at liberty to fill up his place with another passenger; but if at the time of taking his place he pays the whole of the fare, in such case the coach-proprietor cannot dispose of his place, but the passenger may take it at any stage of the journey he thinks fit. (z)

Implied Undertaking of Railway Companies to forward Passengers or Goods without Unnecessary Delay.¹—Every railway company also which has sold tickets to an intended passenger impliedly undertakes to provide means of conveyance and forward him to his place of destination with reasonable speed, (a) and is responsible in damages if the passenger suffers serious personal inconvenience from a breach of this undertaking. (b) But pecuniary loss sustained by the passenger by reason of his not being able to get to a place which he could otherwise have arrived at in time to meet persons with whom he had appointments, is too remote. (c) The principle is that, if one party does not perform his contract, the other may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing; and a proper test of what is reasonable is to consider whether, according to the ordinary habits of society, a person delayed on his journey would have incurred the expenditure in question on his own account. (d)

If railways are blocked up and impeded by snow, the company is bound to use all reasonable exertions to forward the passengers, though extra expense must be incurred by the company in

¹ *Gordon v. Manchester, &c. R. R. Co.*, 52 N. H. 596; *Savannah, &c. R. R. Co. v. Bonaud*, 58 Ga. 180; *McClary v. Sioux City, &c. R. R. Co.*, 3 Neb. 44.

(y) *Long v. Horne*, 1 C. & P. 611.

(z) *Ker v. Mountain*, 1 Esp. 26.

(a) *Gt. North. Ry. Co. v. Hawcroft*, 21 L. J. Q. B. 179.

(b) *Hobbs v. London & South-West-*

ern Ry. Co., L. R. 10 Q. B. 111; *Burton v. Pinkerton*, L. R. 2 Ex. 340.

(c) *Hamlin v. Great Northern Ry. Co.*, 1 H. & N. 408; 26 L. J. Ex. 20.

(d) *Le Blanche v. L. & N. W. Ry. Co.*, 1 C. P. D. 286, C. A.

so doing, which they have no means of recovering from their passengers; but the owners of goods and cattle have no right to complain that extraordinary efforts which are made to forward passengers are not used to forward cattle and goods. "If a snowstorm occurs which makes it impossible to forward cattle except by extraordinary means, involving additional expense, the company are not bound to use such means and to incur such expense." (*e*) So if there be delay in delivering goods by reason of an accident occurring on the defendants' line, such accident being caused wholly by the negligence of another railway company which had running powers over the defendants' line, the defendants, in the absence of a special contract to deliver within a certain time, are not responsible. (*f*)

[*530] * **Negligence of Common Carriers — Implied Undertaking.** — Common carriers are bound by the mere fact of their having received passengers, independently of any contract, to take the utmost care for their safe conveyance; (*g*) and if an accident arises causing injury, a common carrier can discharge himself only by proving that the accident was inevitable: (*h*) that is, that it did not occur from the want of due care, not only on the part of himself and his servants, but also on the part of any independent contractor who may have been employed by him to construct the means of conveyance. (*i*) The carrier, however, is not bound, as we have seen (*ante*, p. * 521), at his peril to provide a carriage absolutely roadworthy at the commencement of the journey; and if the carriage turns out to be defective, he is not liable to a passenger for the consequences if the defect was of such a nature that it could neither be guarded against in the process of construction, nor discovered by subsequent examination. (*k*) Where a passenger stood up and looked out of the window, and by reason of the door being unfastened,

(*c*) *Briddon v. Great Northern Ry. Co.*, 28 L. J. Ex. 51.

(*f*) *Taylor v. Great Northern Ry. Co.*, L. R. 1 C. P. 385.

(*g*) *Austin v. Great Western Ry. Co.*, L. R. 2 Q. B. 442.

(*h*) *Burns v. Cork & Bandon Ry. Co.*, *infra*.

(*i*) *Grote v. The Chester and Holyhead Ry. Co.*, 2 Ex. 251; *Burns v. The*

Cork & Bandon Ry. Co., 13 Ir. C. L. R. 543; *Francis v. Cockerell*, L. R. 5 Q. B. 184, 501; 39 L. J. Q. B. 291; *John v. Bacon*, L. R. 5 C. P. 437; 39 L. J. C. P. 365.

(*k*) *Readhead v. The Midland Ry. Co.*, L. R. 4 Q. B. 379; 38 L. J. Q. B. 169; *Richardson v. Gt. E. Ry.*, 1 C. P. D. 342.

fell out and was injured, it was held that there was evidence of negligence by the railway company for which they were liable. (*l*) But a passenger may by special agreement contract to be carried at his own risk, so as to exempt the company from responsibility for even the gross and wilful negligence of their servants; (*m*) and in such a case the company will be exempt from liability not only during the transit, but while the passenger is leaving the company's premises. (*n*) Such a special agreement will protect not only the company with which it is made, but also any other company on whose line the passenger may be carried in the course of the journey. (*o*)

A common carrier of goods is not, in the absence of a special contract, bound to carry within any given time, but only within a time which is reasonable, looking at all the circumstances of the case, and he is not responsible for the consequences of delay arising from causes beyond his control. Thus when a railway company were prevented, by an unavoidable obstruction on their line, from carrying the plaintiff's goods within the usual (a * reasonable) time, and the obstruction was [* 531] caused by an accident resulting solely from the negligence of another company, who had, under an agreement sanctioned by act of parliament, running powers over their line, it was held that the first-named company were not liable to the plaintiff for damage to his goods caused by the delay. (*p*)

An invitation to passengers to alight on the stopping of a train, without any warning of danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence. (*q*) The opening of the carriage door is an invitation to alight; (*r*) and so is the bringing up of a train to a final stand-still, for the

(*l*) *Gee v. Metropolitan Ry. Co.*, L. R. 8 Q. B. 161, commenting on *Adams v. L. & Y. Ry.*, L. R. 4 C. P. 739.

(*m*) *McCawley v. Furness Ry. Co.*, L. R. 8 Q. B. 57; 42 L. J. Q. B. 4.

(*n*) *Gallin v. London & North Western Ry. Co.*, L. R. 10 Q. B. 212.

(*o*) *Hall v. North-Eastern Ry. Co.*, L. R. 10 Q. B. 437; as to how far this applies to carriage of goods, see *post*,

p. * 556, Railway and Canal Act, reasonable conditions.

(*p*) *Taylor v. Great Northern Ry. Co.*, L. R. 1 C. P. 385; 35 L. J. C. P. 210.

(*q*) *Cockle v. L. & S. E. Ry. Co.*, L. R. 7 C. P. 321.

(*r*) *Prager v. Bristol & Exeter Ry. Co.*, 24 L. T. N. s. 105; *L. & N. W. Ry. v. Hellawell*, 26 L. T. N. s. 557; *Gill v. G. E. Ry.*, 26 L. T. N. s. 945.

purpose of the passengers alighting, after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out, if he purposes to alight at the particular station. (s) If the plaintiff, exercising his own discretion, chooses to get out of a train which has overshot the platform, the company are not responsible, (t) especially when the station is well known to the plaintiff. (u) Calling out the name of the station before the train has come to a stand-still is not an invitation to alight; nor is merely over-shooting the platform negligence. (v) But if the porter has called out the name of the station, and the engine-driver has overshot the platform, and the train has come to a stand-still, and no warning is given not to alight, the jury may very properly say that a passenger is not guilty of negligence in getting out. (x) Similar considerations arise in cases where the door of a railway-carriage is slammed by a porter upon the hand of the plaintiff, and which may or may not be the negligence of the company or of the plaintiff, according to circumstances. (y)

Loss of Goods by Common Carriers.¹ — “The law,” observes Holt, C. J., “charges every person exercising the public employment of a common carrier, common hoyman, or master [*532] of a ship intrusted to *carry goods, against all events but acts of God and enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this

¹ See note on Liability of common carrier for loss by fire, by A. C. Freeman, 31 Am. Dec. 554.

(s) *Cockle v. L. & S. E. Ry. Co.*, *supra*; *Bridges v. L. & N. W. Ry.*, L. R. 7 H. L. 215; *Rose v. N. E. Ry.*, L. R. 2 Ex. D. 248; *Nichols v. Gt. Southern Co.*, 7 Ir. C. L. 40; 21 W. R. 387.

(t) *Siner v. G. W. Ry.*, L. R. 4 Ex. 117; 38 L. J. Ex. 67; but see *per Brett*, L. J., on this case in *Robson v. N. E. Ry.*, L. R. 2 Q. B. D. 86; 46 L. J. Q. B. 50; and see *Weller v. L. B. & S. C.*, *infra*, and *Rose v. N. E. Ry.*, *supra*.

(u) *Lewis v. L. C. & D. Ry.*, L. R. 9 Q. B. 66.

(v) *Lewis v. London, Chatham &*

Dover Ry. Co., L. R. 9 Q. B. 66; *Cockle v. South-Eastern Ry. Co.*, L. R. 5 C. P. 468; 7 C. P. 321.

(x) *Weller v. London, Brighton & South Coast Ry. Co.*, L. R. 9 C. P. 126.

(y) *Fordham v. L. B. & S. C. Ry.*, L. R. 4 C. P. 619; 38 L. J. C. P. 324; *Richardson v. Met. Ry.*, 37 L. J. C. P. 176; *Maddox v. L. C. & D. Ry.*, 38 L. T. N. s. 458; *Coleman v. S. E. Ry.*, 4 H. & C. 699; *Jackson v. Met. Ry.*, L. R. 10 C. P. 49; *Met. Ry. Co. v. Jackson*, 3 Ap. Cas. 193.

is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sort of persons, that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." (z)

By the term "act of God" is meant something in opposition to the act of man, such as storms, lightning, tempests, and inevitable accidents not resulting from human agency. If the danger or the accident, though unavoidable, has been occasioned by the act of man, the carrier cannot avail himself of it as an excuse for the non-delivery of the goods. (a) Thus, where an action was brought against a common carrier for not safely carrying and delivering a quantity of hops, and it appeared that a fire broke out in a building adjoining a booth under which the carrier had placed the hops, and burnt with inextinguishable violence, and extended itself to the hops, and consumed them, without any neglect or default on the part of the carrier himself, it was held that, inasmuch as the fire had not been occasioned by lightning, but by the act of man, the occurrence of the disaster constituted no answer to the action. (b) If the goods have been destroyed or swept away by rains and floods, the circumstances attendant upon the loss must be regarded, in order to determine whether it has been occasioned by the act of God or the act of man. If the common carrier has neglected to provide proper covering for the goods; if he has gone out of his way to meet the danger; if he has travelled by unusual roads, or crossed a plain subject to inundations when he might have kept the high ground and been safe, the loss occasioned thereby is a loss from the act or negligence of man, and the common carrier is consequently responsible therefor. (c)

(z) *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Smith's L. Ca. 6th ed. 177.

(a) *Oakley v. Ports., &c. Steam Packet Co.*, 11 Exch. 622; 25 Law J. Exch. 99.

(b) *Forward v. Pittard*, 1 T. R. 33; *Hyde v. Trent Nav. Co.*, 5 T. R. 399.

(c) *Doct. & Stud.*, Dial. 2, ch. 38; *Noy*, ch. 43.

If a barge-owner who carries goods for hire on a canal accepts certain goods to be carried for hire, and rats gnaw a hole in the barge and cause a leak, and the goods are injured, the barge-owner is responsible for the damage. (*d*) He is not, of course, responsible for any deterioration in the value of the goods resulting from the negligence or want of care of the owner or [* 533] the consignor, such as * defective packing, nor for losses occasioned by an inherent defect in the article, causing its destruction. If, however, the defective packing of goods is patent and visible, and easily remedied, and he accepts the goods for conveyance, he is bound to take all reasonable means to provide against the defect and secure their safety. Where a dog, with a string about his neck, was delivered to a common carrier to be carried, and was tied by the string in a watch-box, and shortly afterward the dog slipped his head through the noose and escaped, and was never seen afterward, and an action was brought to recover the value of the dog, and it was contended that the owner ought to have taken care that the cord was properly secured round the dog's neck, it was held that as the common carrier had the means of seeing that the dog was insufficiently secured, he ought to have locked him up or taken other proper means to secure him, and that he was responsible for the loss. (*e*) Where, however, a greyhound, secured in the way ordinarily adopted and obviously intended by the owner to be used, viz., by a collar and strap, was delivered to a railway company to be carried, and the greyhound during the journey slipped his head through the collar and was lost, it was held that the company was not responsible. (*f*)

Common carriers are not responsible for the "inherent vice" of the goods which they carry, so that where animals are injured by their own acts and without any negligence on the part of the carrier, the carrier is not liable. (*g*)

If a cargo or load of goods weighing a certain weight be delivered to a common carrier to be carried for hire, and the cargo on its arrival at its destination is deficient in weight, there

(*d*) *Dale v. Hall*, 1 Wils. 281.

(*g*) *Blower v. G. W. Ry.*, L. R. 7 C.

(*e*) *Stuart v. Crawley*, 2 Stark. 324.

P. 655; *Kendal v. L. & S. W. Ry.*, L. R.

(*f*) *Richardson v. North-East. Ry.*,
L. R. 7 C. P. 75.

is a *prima facie* presumption of negligence on the part of the carrier which the latter must rebut by showing that the deficiency of weight arose from causes over which he had no control. (*h*)

If the accident or casualty causing the loss of the goods is occasioned by the misconduct of a third person, and not by any fault or neglect on the part of the common carrier himself, the latter is nevertheless responsible to the owner for the loss, as he has himself a remedy over against the offending party. Thus where the ship of a common carrier by water drove on an anchor in the River Humber and was sunk, and the goods on board were injured, and the accident was occasioned by the neglect of a third person in not having his buoy out to mark the place where his anchor lay, it was held that the common carrier was nevertheless * bound to make good the loss. (*i*) But if [*534] the misconduct of the third person is caused by the orders of the owner of the goods, the carrier, of course, will not be responsible. (*k*)

If a man professes to be a common carrier of passengers merely, and only receives occasionally, and at his own option, some trifling articles of luggage with such passengers, to be carried gratuitously for the accommodation of the latter, he cannot be charged as a common carrier of goods for the loss of them. He is in such a case a gratuitous bailee of the goods, and chargeable only with the liabilities and responsibilities of a person who gratuitously undertakes to carry goods for another. Such is an omnibus proprietor, who professes only to carry passengers, and receives his hire solely therefor, but occasionally receives and carries gratuitously small bundles and parcels for the accommodation of his passengers. As he does not profess to carry goods for hire, he cannot be compelled to receive them as a common carrier of goods, neither can he be charged except as a gratuitous bailee for the loss of them. And if luggage is carried free, upon the express terms that the passenger shall himself take charge of it, and that it shall be taken at his risk,

7 Ex. 373; Gill v. Manchester, S. & L. Ry., L. R. 8 Q. B. 186.

(*i*) Trent Nav. Co. v. Ward, 3 Esp. 130.

(*h*) Hawkes v. Smith, Car. & M. 72.

(*k*) Butterworth v. Brownlow, 34 Law J. C. P. 267.

he cannot make the carrier responsible for the loss of it. (*l*) If, however, the carrier or coach-proprietor professes to carry both passengers and luggage, he is clothed, as regards the conveyance of the luggage, with the obligations and responsibilities of a common carrier of goods for hire, (*m*) whether the hire is paid by the passenger or by some other person on his behalf or for his benefit. (*n*)

Contributory Negligence.—If goods delivered to be carried are lost or stolen by the way, and the conduct of the bailor or consignor himself has conduced to the loss, he has no ground at common law for seeking compensation at the hands of the common carrier. (*o*) Thus where a man hid one hundred pounds sterling in some hay in an old nail bag, and delivered it to a common carrier to be carried to a banker, and the money was lost, it was held that the common carrier was not responsible for the loss, as the consignor had neglected to inform the carrier of the exceeding value of the bag, and had thereby prevented him from taking proper care of it. (*p*)

So where the consignor concealed a quantity of guineas in an ordinary brown-paper parcel tied with a string, (*q*) and [*535] a number * of sovereigns in a packet of tea, (*r*) and several hundred pounds' worth of bank-notes and gold in an ordinary school-boy's box, and the money so sent was lost by the way, it was held that the common carrier was not responsible for the loss of it. (*s*) And if glass or china, or fragile articles requiring great care for their safe conveyance, are put into boxes and packages and delivered to a carrier to be carried, and no notice is given to the latter of the peculiar nature of the contents of such packages and of the additional care required for their safe conveyance, and the things are damaged in the course of the transit, the carrier is not bound to make good the damage,

(*l*) *Stewart v. Lond. & North-West. Ry. Co.*, 33 Law J. Exch. 199. As to passengers' luggage generally, see *post*, p. * 544.

(*m*) *Brooke v. Pickwick*, 4 Bing. 218.

(*n*) *Marshall v. York & Newcastle Ry. Co.*, 11 C. B. 655; 21 Law J. C. P. 24.

(*o*) *Butterworth v. Brownlow*, *supra*.

(*p*) *Gibbon v. Paynton*, 4 Burr. 2298.

(*q*) *Clay v. Willan*, 1 H. Bl. 298.

(*r*) *Bradley v. Waterhouse*, 3 C. & P. 318.

(*s*) *Batson v. Donovan*, 4 B. & Ald. 37; *Mayhew v. Eames*, 3 B. & C. 601; 5 D. & R. 487.

as the consignor has himself directly contributed to the injury by concealing the peculiar nature of the articles and the amount of care requisite for their safe conveyance. Contributory negligence, it must be borne in mind, is that sort of negligence which, being a cause of the injury, is of such a character that its effect could not have been counteracted or avoided by the ordinary care of the defendant. (*t*) Contributory negligence in actions against carriers is frequently set up where the plaintiff alleged that he was injured in alighting from a train, (*u*) or in getting his hand trapped upon entering the carriage, (*x*) or while travelling from the flying open of the carriage door. (*y*)

Limitation of the Liability of Common Carriers by Public Notice — Carriage of Gold and Silver, Jewelry, Title-deeds, Glass, Silk, &c.¹ — As the common carrier was responsible at common law for the safe carriage of goods and merchandise, and was bound to make good losses by robbery, he was allowed to charge a rate of carriage proportioned to the risk he ran. This risk naturally depended upon the value of the articles he carried; and therefore, when a common carrier was required to carry a bag of gold across Hounslow Heath, it was thought that he was justly entitled to charge more than the ordinary rate of remuneration for merchandise. (*z*) “His warranty and insurance,” observes Lord Mansfield, “are in respect to the reward he is to receive; and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards and other methods of security; and therefore he ought in reason and in justice to have a greater reward.” “A higher price ought in *conscience to [*536] be paid him for insuring the safety of money, jewels, and valuable things, than for insuring common goods of small value.” (*a*) Hence, when packages were brought to common

¹ See *post*, p. *542, American note.

(*t*) See Horace Smith on Negligence, 150; *Radley v. L. & N. W. Ry.*, 1 Ap. Cas. 754; 46 L. J. 573. As to the negligence of a third party, see the above work, and *Ayles v. S. E. Ry. Co.*, L. R. 3 Ex. 146; *Daniel v. Met. Ry.*, L. R. 5 H. L. 45.

(*u*) See the cases, *ante*, p. *531.

(*x*) See the cases, *ante*, p. *531.

(*y*) *Adams v. L. & Y. Ry.*, L. R. 4 C. P. 739; *Gee v. Met. Ry.*, L. R. 8 Q. B. 161.

(*z*) *Tyly v. Morrice*, Carth. 480.

(*a*) *Aston, J.*, 4 Burr. 2302, 2303.

carriers for conveyance, it became usual for the latter to ask the value, and to charge accordingly, and it was held that the owner was in all cases bound by his representation of value, and could not give evidence of the falseness of his own statement, in order to throw an increased responsibility upon the common carrier. But the owner was not bound to declare the value of the parcel unless he was asked; if the common carrier asked no questions, and there was no fraud or intentional concealment to give the case a false complexion, the common carrier was responsible for the safety of the parcel, whatever might be its value. (*b*)

To obviate the inconvenience of asking questions in each case and the difficulty of proving the statements made on each occasion, common carriers resorted to the expedient of advertising in newspapers, and posting on the walls of their booking-offices, public notices to the effect that they would not be liable for the loss of money and valuables enclosed in packages and parcels, unless they received notice of their existence, nor for the loss of ordinary goods and chattels beyond a certain amount, unless the value of such goods was declared and entered at the office, and an increased rate of remuneration paid for their conveyance. So long as these public notices and advertisements were used with the *bona fide* intention of protecting the common carrier against fraud on the part of persons sending packages of great value and small bulk for conveyance, and of securing to him a rate of remuneration proportioned to the value of the parcel and the risk he ran, they were encouraged and supported; (*c*) but when they were used, as they soon were, for the purpose of enabling the common carrier altogether to shake off his common law responsibility, and of concealing and favoring fraud towards his customers, and shielding him from the consequences of his own negligence and misconduct, they were condemned and discouraged. All sorts of difficulties at last arose with respect to these notices. On some occasions they were held to be inoperative, because the party bringing the goods to the office where they were posted up was unable to read, and the notice consequently

(*b*) *Riley v. Horne*, 2 M. & P. 340. *Harris v. Packwood*, 3 Taunt. 264;

(*c*) *Gibbon v. Paynton*, 4 Burr. 2301; *Marsh v. Horne*, 5 B. & C. 326.

afforded him no information, (*d*) or, being able to read, he never did read the notice; (*e*) and it was sometimes held that the attention of the consignor of the parcel ought to be drawn to the printed terms of conveyance in such a * way that [* 537] if he remained in ignorance of them, such ignorance was wilful, or attributable to his own negligence. (*f*)

The contradictory decisions upon the proof and effect of these notices, and the confused state of the law respecting them, at last rendered the interference of the legislature necessary, in order to protect the common carrier, on the one hand, from fraud and concealment on the part of the consignor of parcels and packages, and to protect the consignor, on the other, from fraud, negligence, and misconduct on the part of the common carrier.

Common Carriers' Act — Declaration of Value by Consignors.¹

—The 11 Geo. IV. and 1 Wm. IV. c. 68, commonly called the Carriers' Act, by sect. 1 exempts common carriers by land from liability for the loss of (*g*) or injury to gold or silver, precious stones, jewelry, watches, clocks, trinkets, bills, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, paintings, (*h*) engravings, pictures, (*i*) plated articles, glass, (*k*) china, silks, (*l*) in a manufactured or unmanufactured state, furs, lace, (*m*) wrought up or not wrought up with other materials, (*n*) contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany

¹ See U. S. Rev. Stat. sect. 4281; also *post*, p. *542, American note.

(*d*) *Davis v. Willan*, 2 Stark. 280.

(*e*) *Kerr v. Willan*, *ib.* 44; *Butler v. Heane*, 2 Campb. 415.

(*f*) *Clayton v. Hunt*, 3 *ib.* 27; *Gouger v. Jolly*, Holt, 317; *Walker v. Jackson*, 10 M. & W. 173; *Brooke v. Pickwick*, 4 Bing. 222; see cases as to these points, *post*, p. *544, *Passengers' luggage*.

(*g*) *Hearn v. Lond. & S. W. Ry. Co.*, 10 Exch. 801; 24 L. J. Ex. 180.

(*h*) *I. e.* paintings which are works of art, see *Woodward v. L. & N. W. Ry.*, 3 Ex. D. 121.

(*i*) Where framed pictures are sent by a carrier, the frames as well as the pictures are within the act. *Henderson*

v. London & North-Western Ry. Co., L. R. 5 Ex. 90.

(*k*) As to a glass frame, see *Treadwin v. Gt. Eastern Ry.*, L. R. 3 C. P. 308.

(*l*) Silk guards and silk dresses are included under the term silks. *Bernstein v. Baxendale*, 6 C. B. N. s. 259; 28 L. J. C. P. 265; overruling *Davey v. Mason*, Car. & M. 50. So, also, is elastic silk webbing, made as described in *Brunt v. The Midland Ry. Co.*, 2 H. & C. 889; 33 L. J. Ex. 187.

(*m*) By the 28 & 29 Vict. c. 94, sect. 1, the term "lace" is not to include machine-made lace.

(*n*) See *Brunt v. Mid. Ry.*, *supra*.

the person of any passenger in any public conveyance, when the value of such articles or property contained in such parcel or package shall exceed the sum of TEN POUNDS, unless, at the time of the delivery thereof for the purpose of being carried or of accompanying the person of any passenger, the value and nature of such articles or property shall have been DECLARED by the person sending or delivering the same, and the increased charge thereafter mentioned (sect. 2), or an engagement to pay the same, accepted by the person receiving such parcel or package. Pictures placed in a wagon with wooden sides, but without a top, so that they could be seen to be pictures, but their exact character could not be seen, were held to be contained in a

parcel or package. (*o*) Mere mention of the value to a [*538] station-master is *no declaration of value within the meaning of the act, if it was not intended to operate as a declaration of value. (*p*) When the declaration is formally made, the carrier is entitled, if the value exceeds £10, and he has a notice of the increased rate of charge for parcels exceeding the value of £10 stuck up in his office, to demand the increased rate of charge; but if he does not think to notify the increased rate of charge, he cannot demand it; and if he has notified it, but fails to demand it, he must be taken to have received the goods subject to his common law liability as an insurer of their safe conveyance, and will not be entitled to the protection of the statute. (*q*) The consignor is bound by his declaration, and cannot afterward show that the value of the goods exceeded that declared. (*r*) If the journey is to be performed partly by land and partly by sea, the contract is divisible, and the carrier is entitled to the protection of the Merchant Shipping Acts as far as the journey is to be performed by sea, (*s*) and to the protection of the Carrier's Act so far as it is to be performed by land; (*t*) and he will not lose such protection by having received the goods under a special contract, unless its terms are inconsis-

(*o*) *Whaite v. L. & Y. Ry. Co.*, L. R. 9 Ex. 67.

(*p*) *Robinson v. S. W. Ry. Co.*, 19 C. B. n. s. 51; 34 L. J. C. P. 235.

(*q*) *Behrens v. Gt. North. Ry. Co.*, 30 L. J. Ex. 153; 31 L. J. Ex. 299; 7 H. & N. 950.

(*r*) *M'Cance v. Lond. & N. W. Ry. Co.*, 3 H. & C. 343; 34 L. J. Ex. 39.

(*s*) *London & S. W. Ry. Co. v. James*, L. R. 8 Ch. 241; 42 L. J. Ch. 337.

(*t*) *Le Conteur v. London & S. W. Ry. Co.*, 6 B. & S. 961; L. R. 1 Q. B. 54; 35 L. J. Q. B. 40.

tent with the goods having been received by him in his capacity of a common carrier. (*u*)

Of the fixing up of Notices required by the Statute.— By sect. 2, when any parcel or package containing any of the specified articles shall be delivered, and its value and contents declared, and such value shall exceed ten pounds, it shall be lawful for such common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or receiving-house where such parcels are received by them for the purpose of conveyance, stating the increased rate of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels containing such valuable articles at such office shall be bound by such notice, without farther proof of the same having come to their knowledge. By sect. 3, when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same * shall have been accepted, the person receiv- [*539] ing such increased rate of charge or accepting such engagement shall, if required, sign a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice shall not have been affixed, the common carrier shall not be entitled to any benefit or advantage under the act, but shall be responsible as at common law, and be liable to refund the increased rate of charge. No public notice or declaration is (sect. 4) to limit or in anywise affect the liability at common law of any such common carriers.

Every office, warehouse, or receiving-house which shall be used or appointed by any common carrier for the receiving of parcels to be conveyed, is (sect. 5) to be deemed and taken to be the receiving-house, warehouse, or office of such common carrier. And where any parcel shall have been delivered at any such office, and the value and contents declared, and the increased rate

(*u*) *Baxendale v. The Great Eastern Ry. Co.*, L. R. 4 Q. B. 244; 38 L. J. Q. B. 137.

of charge paid, and such parcel shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled (sect. 7) to recover back such increased charges, in addition to the value of such parcel.

Nothing in the act is (sect. 6) to annul or affect any special contract between such common carriers and any other parties for the conveyance of goods and merchandise; but this section only applies to contracts, the provisions of which are inconsistent with the exemption claimed by the carrier under the first section; (*x*) nor (sect. 8) to protect any common carrier for hire from liability to answer for loss or injury to any goods or articles arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ, nor to protect any such coachman, &c., from liability for any loss or injury occasioned by his own personal neglect or misconduct.

The fourth section of the Carriers' Act (cited *supra*) enacts that no public notice or declaration shall be deemed or construed to limit, or in anywise affect, the liability at common law of any common carriers in respect of any articles or goods to be carried or conveyed by them, but that they shall be liable, as at common law, to answer for the loss of or injury to any articles and goods in respect whereof they may not be entitled to the benefit of that act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding. But nothing contained in the act is (sect. 6) to annul or in anywise affect any special contract [* 540] between common carriers * and any other parties for the conveyance of goods and merchandise. This statute is confined to public notices, such as were very common before the act, — notices addressed to the public at large, raising a question in every case whether the notice was brought home to the particular person. It is not applicable to a notice specifically delivered to form the basis of a special contract with him. (*y*) Where the common carrier is not a common carrier of the particular description of goods tendered him for conveyance, and has the option of receiving them or rejecting them at his own

(*x*) *Baxendale v. Gt. Eastern Ry., Ry. Co., 2 Ell. & Bl. 761; Van Toll v. South-Eastern Ry. Co., 31 L. J. C. P. 241.*
supra.
 (*y*) *Walker v. York & North Mid.*

good will and pleasure, he may prescribe his own terms of conveyance; and if the party delivering goods to be carried has been personally served with a notice of the terms on which the common carrier carries goods, and after seeing the notice sends the goods, he must be taken to agree that they shall be carried on those terms, and there is then a special contract between him and the common carrier for their conveyance, (:-) unless the carriage is by railway or canal, so as to necessitate a signed special contract under the Railway and Canal Traffic Act. (a) But this is not the case with regard to such articles as the common carrier is bound by his public profession and employment to carry. With regard to them, the owner has a right to insist that the common carrier shall receive the goods subject to all the responsibilities incident to his employment. (b) "If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier." (c) A remover of furniture for hire is not generally, as it should seem, a common carrier, and at all events where a special contract is entered into between the owner of the furniture and the carrier, it would exclude any question of liability as a common carrier. (d) Special contracts with railway and canal companies must, as we shall presently see, be authenticated by a signed writing (*post*, p. * 555). If the consignor of packages exceeding £10 in value, containing the valuable articles specified in the Carriers' Act, objects to pay the *ad valorem* rate of carriage or premium of insurance, and wishes to have the parcel carried as a parcel of ordinary value, at the ordinary rate of carriage for parcels of similar bulk and weight, the common carrier may, if he pleases, waive his right to the increased remuneration or premium

* of insurance, and agree to carry for a smaller sum, [*541] upon the terms that he is not then to be responsible upon the extended customary liability of a common carrier as

(z) *Wightman, J.*, 2 Ell. & Bl. 760.

(a) *Post*, p. * 555.

(b) *Ld. Kenyon, Kirkman v. Shawcross*, 6 T. R. 17; *Garton v. Brist. & Ex. Ry. Co.*, 1 B. & S. 162; 30 L. J. Q. B. 276.

(c) *Hollister v. Nowlen*, 19 Wend. 247; *New Jersey St. Nav. Co. v. Merchts. Bank*, 6 How. 344; *Crouch v. London & North-West. Ry. Co.*, 23 L. J. C. P. 73.

(d) *Scaife v. Farrant*, L. R. 10 Ex. 358.

an insurer against robbery and the dangers and accidents of the road. "This limitation," observes Parke, B., "it is competent for a common carrier to make, because, being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own terms." (e)

Common Carriers may protect themselves by Special Contract from Loss by Fire and Sea Risks, and may carry goods on the terms that they are not to be held responsible at all for such losses. (f)

Stipulations exempting Common Carriers by Water from Loss of Luggage, unless a Bill of Lading has been signed for it.—Where the Atlantic Mail Steam Navigation Company issued passengers' tickets on which was printed a notice or condition "that the ship will not be accountable for luggage, goods, or other descriptions of property, unless bills of lading have been signed therefor, each passenger allowed twenty cubic feet of luggage free," it was held that the company had a right to impose this condition on their passengers, provided it was imposed upon all alike; that the passenger, therefore, was bound to get a bill of lading for all the luggage for which he intended to make the ship accountable, but that he had the option of taking luggage under his own personal control without any bill of lading, carrying it, in that case, at his own risk. (g) If the company does not impose the same terms upon all passengers alike, or the passenger offers to sign a bill of lading and is unable to obtain it, the company cannot avail themselves of the condition as protecting them from liability. (h)

When the Carrier may by Special Contract exempt himself from all Responsibility for Damage to Certain Classes and Descriptions of Goods in Transitu.¹—Whenever a man enters

¹ Former American decisions upon the right of common carriers to limit their strict common law liability were very conflicting; but there is a strong tendency

(e) *Wyld v. Pickford*, 8 M. & W. 458.

(f) *Maving v. Todd*, 1 Stark. 74; *Collins v. Brist. & Ex. Ry. Co.*, 11 Exch. 790; 7 H. L. C. 205.

(g) *Wilton v. Royal Atl. Mail St. Nav. Co.*, 10 C. B. N. S. 453; 30 L. J. C. P. 369.

(h) *Gt. West. Ry. Co. v. Goodman*, 12 C. B. 313.

into a contract for the carriage of goods, he impliedly grants or lets out some labor and care for the accomplishment of the work

in recent years towards agreement. That there may be some limitation of the liability is now generally conceded; the chief questions lately discussed are: Is a notice sufficient, or must the customer assent? If assent is requisite, must this be explicit, or may it be implied from silence or imputed from circumstances? And may the entire double liability of the carrier be restricted, or is the privilege of limiting it confined to that aspect of his responsibility in which he is viewed as an insurer, leaving the liability for negligence either of the principal or of his agents or servants to be invariably enforced according to strict rules of law? The course of decision in the United States Supreme Court disallows a mere notice or implied contract. The doctrine there is that the liability of a carrying company may be limited by a contract; but there must be a proper contract, to which the actual assent of the customer is necessary, and also that the privilege of contracting for a limitation is allowable only within such limits as are just and reasonable, and consistent with the general policy of the law. Thus even an explicit contract that the company shall not be chargeable for losses attributable to negligence of its agents and servants is not enforceable against the customer. *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; *Ayres v. Western R. R. Corp.*, 14 Blatchf. 9; but see restriction on the doctrine of this case suggested in *Wertheimer v. Pennsylvania R. R. Co.*, 1 Fed. Reporter, 232; and views sustaining limitations couched in the form of an agreement fixing the value of the property carried, in *Hart v. Pennsylvania R. R. Co.*, 2 McCrary, 333; *Muser v. Holland*, 17 Blatchf. 412; *s. p.* even under the Illinois Statute, *Mather v. American Exp. Co.*, 9 Biss. 293. See further, *Insurance Co. v. St. Louis, &c. Ry. Co.*, 9 Fed. Reporter, 811.

The decisions in the courts of most of the States appear to be substantially in accord with this doctrine. The positions, that a notice to the customer does not affect his rights even if brought to his knowledge, but he is entitled to commit his property to a carrying company for transportation under its public duty, if he chooses to do so; that he may, however, if some advantage, such as a lower rate, is given him, bind himself by an assent to relieve the company of a part of it; and that this assent will not operate to discharge it from losses from negligence; have been taken more or less distinctly in a number of adjudications. Alabama, Colorado, Connecticut, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Pennsylvania, Tennessee, Vermont, Virginia, are stated by Mr. Lawson (*Lawson, Contr. Car.*) to have substantially adopted such tenets, and the most recent decisions indicate general adherence to them. *Dillard v. Louisville, &c. R. R. Co.*, 2 Lea, 288; *Merchants' Despatch Transp. Co. v. Leysor*, 89 Ill. 43; *Merchants' Despatch Transp. Co. v. Joesting*, *ib.* 152; *American Exp. Co. v. Spellman*, 90 Ill. 455; *Erie, &c. Transp. Co. v. Dater*, 91 Ill. 195; *Michigan Central R. R. Co. v. Boyd*, *ib.* 268; *Boscowitz v. Adams Express Co.*, 93 Ill. 523; *Shriver v. Sioux City, &c. R. R. Co.*, 24 Minn. 506; *Hadd v. United States, &c. Exp. Co.*, 52 Vt. 335; *Green v. Boston, &c. R. R. Co.*, 128 Mass. 221; *New Orleans, &c. R. R. Co. v. Faler*, 58 Miss. 911; *Merchants' Despatch, &c. Co. v. Cornforth*, 3 Col. T. 280; *Chicago, &c. R. R. Co. v. Hale*, 2 Ill. App. 150; *Capehart v. Seaboard, &c. R. R. Co.*, 81 N. C. 438. In Iowa and Texas, the courts would, at least until very lately, have been restricted or prevented from sustaining even express contracts limiting the liability by statutes forbidding such limitations. West Virginia has long allowed them, and until lately carried the view so far as to sustain stipulations against liability for

of carrying, in return for the hire paid or agreed to be paid him ; and it was formerly held that he could not enter into the contract and at the same time say that he would bestow no labor or care at all in and about the performance of what he had undertaken to do, and for which he received his hire. "It is impossible," justly observes Lord Ellenborough, "without [*542] outraging common sense, so * to construe a special contract for the carriage of goods, as to make the carrier say : 'We will receive your goods, but we will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious.' " (i) "If the carrier should perchance refuse to carry

negligence; but the former decision to this effect (*Baltimore, &c. R. R. Co. v. Rathbone*, 1 W. Va. 87), has been overruled. In a recent case (*Maslin v. Baltimore, &c. R. R. Co.*, 14 W. Va. 180; reasserted, *Brown v. Adams Exp. Co.*, 15 ib. 812), the Supreme Court of that State has re-examined the former case, and pronounced it erroneous; and has thus harmonized its ruling with the weight of opinion elsewhere. Early views in New York were adverse to allowing the carrying companies any privilege of throwing off the liability imposed by old English law. Later cases continue to disallow mere notice; the assent of the customer to the proposal to carry his goods at his own risk must be obtained; it may, however, be presumed from such circumstances as fairly imply it, for example, from accepting a receipt containing a limitation, with full opportunity to understand its terms, and without objecting. By special contract, carrying companies may protect themselves from any liability, including that for losses ascribable to negligence of employees. The company cannot absolve itself at all by any act of its own agents merely, but with the assent of the customer freely given and fully proved, the limitation may be carried to almost any extent. The latter rule is, however, administered with a good degree of strictness. The Court of Appeals has declared that special clauses in railroad contracts ought always to be construed, if possible, as designed to embrace only losses which are not attributable to negligence. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of business. If, therefore, the language of the contract admits of two constructions, that one is to be preferred which leaves the company liable for losses accruing by negligence, and exempts it from those only which arise otherwise. This view is carried very far in *Minard v. Syracuse, &c. R. R. Co.*, 71 N. Y. 180. In this case there was presented a receipt for live-stock, containing a stipulation that the company should be released from all liability "of every kind and character whatsoever, for or on account of or connected with any damage or injury to, or the loss of, said stock, or any portion thereof, from whatsoever cause arising." The court held that this general language, if read in connection with the circumstances, might well be satisfied by limiting it to such extraordinary liabilities as carriers sustain without fault or negligence on their part, and that it did not exempt from negligent losses. See further, *Spinetti v. Atlas Steamship Co.*, 80 N. Y. 71; *Holsapple v. Rome, &c. R. R. Co.*, 86 N. Y. 275.

(i) *Lyon v. Mells*, 5 East, 438.

the stuffe, unless promise were made unto him that he should not be charged for any misdemeanour that should be in him, the promise were void; for it were against reason and against good manners; and so it is in all other cases like.” (*k*) In the case of articles of a perishable nature, such as fish, or of a very delicate and fragile nature, such as statuary, sculptured alabaster, or marble, which the common carrier does not commonly profess to carry, and which may be readily injured, nobody knows how, the common carrier may, as we have seen, refuse to receive and carry such articles, except under a special contract exonerating him from all responsibility for damage done to them *in transitu* not occasioned by the neglect or default of himself or his servants. (*l*) So with regard to horses, it is said to be very reasonable that common carriers by railway should be allowed to make agreements for the purpose of protecting themselves against the peculiar risks attendant upon the carriage of horses by railway, arising from the rapid motion and strange noises, which are calculated to alarm horses and cause them to kick and break the carriage, and do themselves injury. It was therefore held, before the passing of the Railway and Canal Traffic Act (*post*, p. * 555), that railway companies might by special contract throw the risk of the conveyance of a horse by railway upon the owner of the horse, so that if the horse was injured in the transit from any ordinary railway casualty, the owner would have no remedy against the company for the loss. (*m*)

The notices commonly given by common carriers before the passing of the Carriers’ Act, that they would not be responsible for the loss of or damage to parcels above a certain value, unless the value was declared and a premium of insurance paid, were held to apply only to the responsibilities and liabilities of the carrier as an INSURER of the safety of the goods, and did not and could not exempt him, in the absence of fraudulent concealment of value or risk on the part of the consignor, from the conse-

(*k*) Doct. & Stud. Dial. 2, ch. 39; Noy’s Maxims, ch. 43, 92.

(*l*) Beal v. South Devon Ry. Co., 5 H. & N. 875; 29 L. J. Ex. 441; Peek v. North Staff. Ry. Co., 32 L. J. Q. B. 241; Leeson v. Holt, 1 Stark. 186.

(*m*) Carr v. Lanc. & York. Ry. Co., 7 Exch. 714; Harrison v. Lond. Br. & S. Co. Ry. Co., *ante*, p. * 754, overruled by Peek v. North Staff. Ry. Co., 32 L. J. Q. B. 241.

quences of his own misconduct or negligence, or from [*543] the misconduct and negligence * of his servants, and persons in his employ. (n) "By understanding the terms of the notice in this limited sense," observes Bayley, J., "the common carrier will be exempt from those peculiar liabilities which attach to him only in his character of common carrier, but not from the consequence of his own misfeasance, for which every bailee is responsible." (o) Having, by notice or special contract, divested himself of his customary liability of an insurer against robbery and fire and the dangers and accidents of the road, "he still," observes Parke, B., "undertakes to carry from one place to another, and for some reward in respect of the carriage, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to and delivery at the place of destination, and in providing proper vehicles for their carriage." (p) Where a cask of brandy of the value of £70 was accepted by a common carrier to be carried for hire, and the cask began to leak on the road, and the carrier's servant was told that the brandy was escaping, but he made no attempt to stop the leak and save the brandy at any of the stages at which he stopped, although he might easily have done so, and the brandy was consequently lost, it was held that the carrier was not protected from the consequences of the negligence of his servant by having given notice to the consignor that he would not be answerable for any goods of what nature or kind soever above the value of £5, if lost, stolen, or damaged, unless a special agreement was made and an adequate premium paid over and above the common carriage; for here the goods were of large bulk and known quality, and the value was obvious, as well as the degree of care reasonably requisite for their conveyance. (q)

Void Limitations of Liability.¹— A person who undertakes the public employment of a common carrier of merchandise or of passengers and luggage has no more right, it is apprehended, to

¹ See *ante*, p. *541. American note.

(n) *Birket v. Willan*, 2 B. & Ald. 461; *Smith v. Horne*, 8 Taunt. 144; 2 356; *Duff v. Budd*, 6 Moore, 477. Moore, 18.

(o) *Garnett v. Willan*, 5 B. & Ald. 57. (q) *Beck v. Evans*, 16 East, 247; *Smith v. Horne*, 8 Taunt. 144; 2 Moore, 18.

(p) *Wyld v. Pickford*, 8 M. & W. 18.

engraft upon his contract or employment the terms that "all merchandise received by him to be carried is carried at the risk of the owners," or that "all luggage delivered to him by his passengers is carried at the risk of the passengers," and that "he will not be responsible if it is lost or damaged by the way," than a common innkeeper has to refuse to receive guests, except on the terms that he shall not be responsible for the safe keeping of their goods and luggage deposited in his inn. The consignor of merchandise or the passenger has a right to reject these terms, and to insist that merchandise, such as is

* ordinarily carried by the common carrier, or the [*544] customary allowance of luggage for a passenger, shall

be taken at the common carrier's risk, provided the consignor makes the declaration of value, and is ready to pay the premium of insurance in those cases where the declaration and payment are required by law. "The traveller," observes an American judge, "is under a sort of moral duress, a necessity of employing the common carrier; and the latter shall not be allowed to throw off his legal liability. He shall not be privileged to make himself a common carrier for his own benefit and a mandatary or less to his employer. He is a public servant, with certain duties defined by law; and as Ashurst, J., said of the duties of innkeepers, they are *indelible*." (r) But in our own law, where the carriage of particular articles is attended with any peculiar or extraordinary risk, the common carrier is entitled, as we have seen, to refuse to receive and carry such articles, unless the nature and value of the articles are declared, and an increased charge paid for insurance; but he may at the same time receive and carry them under a special contract, providing that they shall be carried at the risk of the owner at a lower rate of charge (*ante*, p. * 540). And if he is a common carrier of passengers merely, and does not profess to carry, and does not receive for carriage, luggage with his passengers, but allows them to carry with them, under their own care, a small quantity of personal luggage, he is not responsible for the loss of it. (s) Where the carrier seeks to set up a special contract limiting his liability, he

(r) Cowen, J., *Cole v. Goodwin*, 19 Wend. 281; *Hollister v. Nowlen*, ib. 234; Angell on Carriers, App. xviii., xxiii.

(s) See *infra*.

must show that the terms of it have been brought to the consignor's notice. The most frequent illustrations of this are to be found in the conditions printed upon luggage tickets, (*t*) where the luggage is left in the cloak-room, the railway company being no longer carriers, but warehousemen. Where a passenger took a ticket in the form of a book of coupons, and inside the book was a condition limiting the responsibility of the company to their own trains, and the passenger was injured in France, the jury found that the condition was not brought to his notice, but it was held that the whole book was the contract, and was accepted by the passenger, and he was bound by the condition. (*u*)

Loss of Passengers' Luggage by Railway Companies.¹—The impossibility of travelling without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveller, has led from the earliest times [* 545] to the practice, on the *part of the carriers of passengers for hire, of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passenger.

Under the older system of travelling, by stage-coaches, canal-boats, or other vessels, the amount of luggage to be thus carried free of charge was commonly made part of the contract by express stipulation or notice from the carrier. Under the modern system of railway conveyance, it is fixed and regulated by the various acts of parliament under which railways have been established. By these acts the right of the passenger is expressly limited to ordinary luggage, which must be taken to mean the personal luggage of the traveller; and the amount

¹ What is baggage, and the liability therefor, see U. S. Dig. tit. *Railroad Companies*; also ib. tit. *Innkeepers*; 1 Abb. Dig. Corp. tit. *Railroads*, 566-576; 2 ib. tit. *Railroads*, 1072-1096; Abb. L. Dict. *Baggage*; see further, *Railroad Co. v. Fraloff*, 100 U. S. 24; *Weeks v. New York, &c. R. R. Co.*, 72 N. Y. 50, 9 Hun, 669; *Lin v. Terre Haute, &c. R. R. Co.*, 10 Mo. App. 125; *Millard v. Missouri, &c. R. R. Co.*, 86 N. Y. 441.

(*t*) See *infra*.

(*u*) *Burke v. S. E. Ry.*, 5 C. P. D. 1, distinguishing *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470.

which he is entitled to take free of charge is ascertained. Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey, must be considered as personal luggage; this would include not only all articles of apparel, whether for use or ornament, but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying. (x) On the other hand, what is carried for the purposes of business, such as merchandise or the like, (y) or for larger or ulterior purposes than those of the journey, such as articles of furniture or household goods, (z) will not come within the description of ordinary luggage, unless the company (with knowledge) choose to take without extra payment that which is not ordinary luggage, in which case they will be responsible for the loss; (a) so also upon any limit in point of weight, if the company choose to allow a passenger to carry more, they will be liable. (a) The liability of common carriers in respect of articles carried as passengers' luggage, is that of carriers of goods as distinguished from that as of carriers of passengers. Most of the Railway Acts provide that, without extra charge, it shall be lawful for every passenger by railway to take with him ordinary luggage or articles of clothing

* of a certain weight and dimensions, and that the com- [*546]
pany shall not be responsible for the safe carriage or custody of, or for any loss of or injury to articles carried upon the railway with, or accompanying the person of, or belonging to, any passenger, or delivered for the purpose of being carried, other than such passengers' articles of clothing. But these enactments do not prevent railway companies from running

(x) *Macrow v. Great Western Ry. Co.*, L. R. 6 Q. B. 612; 40 L. J. Q. B. 300. Ex. 236; *Belfast & Ballymena Ry. Co. v. Keys*, 9 H. L. C. 556.

(y) *Cahill v. London & North-Western Ry. Co.*, 13 C. B. N. S. 818; 31 L. J. C. P. 271; *Great Northern Ry. Co. v. Shepherd*, 8 Exch. 30; 21 L. J. L. R. 4 Q. B. 366; 38 L. J. Q. B. 213.

(a) *Great Northern Ry. Co. v. Shepherd*, 8 Exch. 30; 21 L. J. Ex. 271.

excursion trains for passengers only, without luggage. (*b*) If a railway company starts an excursion train for passengers merely, but allows each passenger to carry with him a small quantity of luggage free at his own risk, and passengers avail themselves of the privilege, and the luggage is lost, the company is not responsible for the loss of it. (*c*) Where a railway company made a by-law to the effect that they "would not be responsible for the care of luggage, unless booked and paid for," it was held that the by-law was null and void. (*d*) Railway companies are responsible for the acts and omissions of their porters in the management and delivery of passengers' luggage. (*e*) But if a passenger packs merchandise in carpet-bags and portmanteaus, and passes it off as luggage, he cannot recover for the loss of it, as he is guilty of an unfair concealment towards the company, in preventing them from making the charge they would be entitled to make for the carriage of merchandise. (*f*) A railway company is in general liable for the loss of a passenger's luggage, though carried in the carriage in which he himself is travelling. (*g*) But the passenger must take ordinary care of it; and, therefore, where the passenger left the carriage in which his luggage was, for another in the course of the journey, and his portmanteau was stolen, it was held that the company was not responsible. (*h*)

Where the passenger retains his own personal control over the luggage, the company are no longer insurers of its safety, but are liable for negligence only. (*i*) Where luggage is received

(*b*) *Rumsey v. North-Eastern Ry. Co.*, 14 C. B. N. s. 461; 32 Law J. C. P. 244.

(*c*) *Stewart v. Lond. & N. West. Ry. Co.*, 33 L. J. Ex. 199; 3 H. & C. 135.

(*d*) *Williams v. Gt. West. Ry. Co.*, 10 Exch. 15; *Munster v. S. E. Ry.*, 4 C. B. N. s. 698.

(*e*) *Mid. Ry. Co. v. Bromley*, 17 C. B. 375; 25 L. J. C. P. 94.

(*f*) *Cahill v. Lond. & North-West. Ry. Co.*, 13 C. B. N. s. 818; 31 L. J. C. P. 271; 30 ib. 294; *Belfast & Ballymena Ry. Co. v. Keys*, 9 H. L. C. 556; *Great Northern Ry. Co. v. Shepherd*, 8 Exch. 30; 21 L. J. Ex. 236.

(*g*) *Le Conteur v. London & South-Western Ry. Co.*, L. R. 1 Q. B. 54; 6 B. & S. 961; 35 L. J. Q. B. 40.

(*h*) *Talley v. Great West. Ry. Co.*, L. R. 6 C. P. 44; 40 L. J. C. P. 9. With respect to luggage deposited in a cloak-room, see *Burke v. S. E. Ry.*, L. R. 5 C. P. D. 1; 49 C. P. D. 107.

(*i*) *Talley v. G. W. Ry.*, L. R. 6 C. P. 44; 40 L. J. C. P. 9; *Bergheim v. Gt. Eastern Ry.*, 3 C. P. D. 221. See as to where luggage is in his control, *Richards v. L. B. & S. C. Ry.*, 7 C. B. 839; *Kent v. Mid. Ry.*, L. R. 10 Q. B. 1; 44 L. J. Q. B. 18; *Mid. Ry. Co. v. Bromley*, 17 C. B. 372.

as luggage of a servant, but it turns out to be the master's, who is following by another train, the company are not liable for the * loss. (*k*) Upon the arrival of the passenger at [*547] the station, the company must deliver his luggage on the platform, allowing him a reasonable time to come and receive it. (*l*) If a railway porter, at the request of a passenger, calls a cab, and places the passenger's luggage on a cab, and there leaves it, and comes away without having the means of identifying the vehicle, and the cab-driver goes off with the luggage before the passenger has taken his seat in the vehicle, the railway company will be responsible for the loss. (*m*) Passengers' luggage is within sect. 7 of the Railway and Canal Traffic Act. (*n*)

Charge for Luggage by Excursion Trains. — Where a passenger by an excursion train, knowing that the railway company did not allow passengers to carry luggage by such trains, nevertheless secretly put luggage into the train, it was held that the law would imply a promise from the wrong-doer to pay the company for the carriage of it. (*o*)

When a Declaration of Value is a Condition precedent to any Liability on the part of the Common Carrier. — The act, it will be observed, applies solely to common carriers *by land*. Where, however, the contract for carriage is divisible, and applies to carriage partly by water and partly by land, and the loss occurs during the carriage by land, the carrier is entitled to the benefit of the statute; (*p*) and where the contract is to carry by land and sea also, it is divisible, so as to afford a defence to the carrier if the loss in fact occurs during the carriage by land. (*q*) The effect of the act is to prevent the owner or consignor from recovering from the common carrier the value of any of the enumerated articles when the value of the contents of the parcel or package in which they are enclosed exceeds £10, and the

(*k*) *Beecher v. G. E. Ry.*, L. R. 5 Q. B. 241; 39 L. J. Q. B. 122.

(*l*) *Patscheider v. G. W. Ry.*, 3 Ex. D. 153.

(*m*) *Butcher v. Lond. & South-West Ry. Co.*, 16 C. B. 13; 24 Law J. C. P. 137; *Richards v. London, Brighton, & South Coast Ry. Co.*, 7 C. B. 839.

(*n*) *Cohen v. S. E. Ry.*, 2 Ex. D. 253; see *post*, p. *560.

(*o*) *Rumsey v. N. E. Ry.*, 32 L. J. C. P. 245; 14 C. B. S. 641.

(*p*) *Baxendale v. Gt. Eastern Ry Co.*, *ante*, p. *538.

(*q*) *Le Conteur v. Lond. & South-West. Ry. Co.*, *ante*, p. *546.

value has not been declared, and the increased rate of charge paid by the consignor pursuant to the statute. The declaration of value must be made by the consignor, whether the common carrier has or has not a notice or tariff of charges for the increased risk of conveyance of such articles stuck up in his office, and whether the articles are delivered at the office of the common carrier, at the sender's house, on the road, or anywhere else. The act requires the person who sends the goods to take the first step, by giving that information which he alone can give, and if he does not take that first step, then he cannot maintain

an action for the value of the lost article by reason of [*548] the * first section of the statute, which expressly says that the common carrier shall not be liable unless the declaration is made. (r) As soon, however, as this has been done, the common carrier is entitled to demand and to have an increased rate of remuneration, which is in the nature of a premium for insurance, provided he has a tariff or notice posted in his office of the sums he charges above the usual rate of charge for the carriage of the articles. If there is no tariff, he has then no right to charge the increased rate, and he loses (provided the declaration of value has been duly made by the consignor) the protection of the act. (s) The declaration of value having been made, the common carrier has no right to know the exact nature of the contents of the parcel, unless he has reasonable grounds for believing that it contains articles of a dangerous character. (t) And if, after the declaration has been made, he receives the goods without demanding an increased rate of charge, he is not protected by the statute. (u) However, the mention of the value incidentally is no declaration of value within the statute. (x)

By whom the Declaration of Value is to be made and the Increased Rate of Carriage paid. — In a case before Lord Ellenborough, before the passing of the Common Carriers' Act, it was

(r) *Pianciani v. Lond. and South-West. Ry. Co.* 18 C. B. 226.

(s) *Baxendale v. Hart*, 21 Law J. Exch. 123; 6 Exch. 789.

(t) *Crouch v. Lond. & North-West.*

Ry. Co., 14 C. B. 295; 23 Law J. C. P. 73; see *ante*, p. * 525.

(u) *Behrens v. Gt. North. Ry. Co.*, 31 Law J. Exch. 299; 30 ib. 153.

(x) *Robinson v. South-West. Ry. Co.*, 34 Law J. C. P. 234.

held that where a tradesman at Gosport received an order in writing for goods to be forwarded to Plymouth, he had an implied authority to do all that was necessary to be done to insure them a safe conveyance; and therefore, that when it was necessary to declare their value, and pay an increased charge for insurance, it was his duty to make the declaration and the payment, so as to enable the consignee, in case of loss, to secure his indemnity from the common carrier; (y) but the limitation of the liability of common carriers in respect of the carriage of glass, china, and the articles mentioned in the Carriers' Act, being now established by act of parliament, must be taken to be known to consignees and consignors alike throughout the kingdom; and it is not the practice, nor, it is apprehended, is it in general the duty, of the consignor to pay the carriage and insure articles directed to be forwarded by his customers, unless he receives express directions so to do. (z) If, indeed, the articles are of an extremely fragile character, and likely to be damaged without great care, or if they are of unusual value, it would be the duty of the consignor to declare their nature * and [*549] value to the common carrier, that proper care might be taken of them (*ante*, p. * 534); and it would be prudent for the consignor, before forwarding goods of this description, to require instructions from the consignee as to the insurance of them.

Articles to which the Statute extends. (a) — The statute extends to all the articles enumerated in the first section, although not within the words of the preamble, "an article of great value in a small compass." It is not sufficient for the owner to describe in writing on the outside of a parcel or box the nature of the contents. The carrier must have distinct information thereof, and an opportunity of demanding the increased rate of carriage. (b) Hat bodies made of felt, which is a substance composed partly of the soft fur or down of the rabbit detached from the skin, and partly of the wool of sheep, have been held not to be "furs" within the Common Carriers' Act, (c) but dresses of

(y) *Clarke v. Hutchins*, 14 East, 476.

(z) *Coshay v. Tute*, 3 Campb. 129; 4 Tyr. 133; *Boys v. Pink*, 8 C. & P. 361.

Bailey v. Sweeting, 9 C. B. N. s. 857.

(a) See also the notes to the section, (c) *Mayhew v. Nelson*, 6 C. & P. 58. *ante*, p. * 537.

silk made up for use are silks within the operation of the act; (*d*) and "silk web," which is composed one third of silk and two thirds of cotton and india-rubber, as being "wrought up with other materials," is also within it. (*e*) By the term "writings" is meant writings of value, and therefore an instrument in writing in an imperfect state, intended to secure a large sum of money, but not being a valid and complete security at the time of the loss, is not within the statute. (*f*) If the contents of a parcel or package exceeding £10 in value are of a miscellaneous character, consisting partly of enumerated articles and partly of things not mentioned or comprised in the act, the common carrier is released from all liability in respect of the former, but as regards the latter, his common law liability remains the same as before the passing of the statute. Thus if a trunk containing linen and wearing apparel, jewelry and trinkets, exceeding £10 in value, be delivered to a carrier to be carried for the ordinary hire, or to accompany the person of a passenger, and such trunk is lost by the way, the carrier is not liable for the value of the jewelry and trinkets, (*g*) but he remains responsible for the value of the trunk and linen and wearing apparel, as at common law before the passing of the act. If, however, the contents of the parcel or package consist entirely of the enumerated articles, the common carrier is by the express terms of the act freed from all responsibility and liability in respect of the loss thereof, if the [* 550] * consignee has not declared the nature and value of the article, and paid or agreed to pay the increased charge specified in the notice, although the loss may have been occasioned by the grossest negligence. (*h*) If an uninsured parcel or package consists entirely of enumerated articles, the plaintiff would not be entitled to recover even the value of the box or case in which they are contained, (*i*) but if there are articles in it to which the statute does not apply, he would. (*k*)

(*d*) *Bernstein v. Baxendale*, 6 C. B. n. s. 259; 28 Law J. C. P. 265, overruling *Davey v. Mason*, Car. & N. 50. act, see *Smith v. Lond. & Brighton Ry. Co.*, C. B. 789.

(*e*) *Brunt v. Mid. Ry. Co.*, 33 Law J. Exch. 187; 2 H. & C. 889.

(*f*) *Stoessiger v. South-East. Ry. Co.*, 23 Law J. Q. B. 293; as to pleading the

(*g*) *Bernstein v. Baxendale*, *supra*.

(*h*) *Hinton v. Dibbin*, 2 Q. B. 646.

(*i*) *Wyld v. Pickford*, 8 M. & W.

(*k*) *Treadwin v. Gt. East. Ry. Co.*, L.

If the consignor, after he has made the declaration of value, objects to pay the *ad valorem* rate of carriage or premium of insurance, and wishes to have the parcel carried as a parcel of ordinary value, at the ordinary rate of carriage for parcels of similar bulk and weight, the carrier may, if he pleases, waive his right to the increased remuneration or premium of insurance, and agree to carry for a smaller sum, upon the terms that he is not then to be responsible upon the customary liability of a common carrier, as an insurer against robbery and the dangers and accidents of the road. "This limitation," observes Parke, B., "it is competent for a common carrier to make, because, being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own terms." (*l*) And if after the declaration has been made the carrier receives the parcel without demanding the increased rate or charge, he receives it as an insurer of its safe conveyance; and the same result follows if he has failed to notify his increased rate of charge in accordance with the terms of the statute. (*m*)

Losses covered by the Statute. — The term "loss" in the statute means loss of things by the carrier or his servants, in the course of the carriage of them, either by losing them from their vehicles, or mislaying them, so that it was not known where to find them when they ought to have been delivered; and not the loss that may be sustained by an owner or consignee by reason of the non-delivery of the chattel in due time, or by reason of great delay in its delivery, whereby the use of the chattel, or the means of turning it to advantage, were lost. (*n*)

Loss of Goods from Theft by the Common Carrier's Servants. — Nothing contained in the Carriers' Act is, as we have seen (sect. 8), to protect any common carrier for hire from liability to answer for * loss of or injury to any goods [*551] or articles arising from the felonious act of any servant

R. 3 C. P. 308. A framed picture is one entire thing, and cannot be divided so as to charge the carrier for the loss of the frame. *Henderson v. L. & N. W. Ry.*, L. R. 5 Exch. 90.

(*l*) *Wyld v. Pickford*, *supra*.

(*m*) *Behrens v. Ct. North. Ry. Co.*, 6 H. & N. 366; 30 Law J. Exch. 153.

(*n*) *Hearn v. Lond. & South-West. Ry. Co.*, 10 Exch. 801; 24 Law J. Exch. 180.

in the carrier's employ. If, therefore, the common carrier relies upon the statute as a defence, contending that there ought to have been, and that there was not, any declaration of value on the part of the consignor, of the article alleged to have been lost, the defence is rebutted, and the case taken out of the operation of the statute, by showing that the loss arose from the felonious act of the carrier's servant. (o)

When the goods have been accepted by a carrier under a special contract for the carriage of them, the statute does not apply. Where, therefore, a common carrier has given express notice to the consignor that he will not be responsible for parcels or packages above the value of £10, unless the value is declared, and an increased rate of remuneration paid according to a printed tariff or scale of charge, and the common carrier afterward accepts a parcel to be carried, knowing it to be worth more than £10, without demanding or receiving the premium for insurance, and the parcel is purloined by his own servant, he is not necessarily responsible for the theft. (p) Having received the goods under a special contract, and not upon his customary liability as an insurer of safe conveyance, he is chargeable only for negligence and want of ordinary care. The loss by theft indeed is *prima facie* proof of negligent keeping, but it is not absolutely conclusive, and the carrier may exonerate himself from liability for the theft by proving his own care and watchfulness, and showing that there was no want of any proper precaution on his part to guard against theft by his servants. "If the consignor," observes Lord Tenterden, "has concealed the value of the parcel from the carrier, and has adopted a disguise for it likely to prevent the carrier from taking any particular care of the parcel, and yet not so completely concealing its nature as to prevent it from being selected for depredation by a dishonest servant, and the loss is the consequence of the means he has adopted, then he cannot maintain an action in respect of the loss." (q)

In order to establish the fact of theft by the common carrier's

(o) *Metcalf v. London & Brighton Ry. Co.*, 4 C. B. N. S. 307; 27 Law J. C. B. 140; *Gt. West. Ry. Co., v. Rimell*, 27 Law J. C. P. 204.
C. P. 205.

(q) *Bradley v. Waterhouse, M. & M.*

(p) *Butt v. Gt. West. Ry. Co.*, 11 154.

servants, it is not enough that there is a greater degree of probability that the carrier's servants took their goods than that a stranger took them by reason of their greater facility of access and opportunities of stealing them. (*r*) It is not necessary, however, to show that some particular servant has committed a felony; it is *sufficient if some evidence is given [*552] which raises a *prima facie* case that the goods were stolen by some or one of the carrier's servants. (*s*)

All persons who are actually, though casually and incidentally, employed by the common carrier in doing the work of carrying, are the servants of the latter, although they may be the regular servants of some other persons, receiving wages from them and not from the carrier. (*t*)

Liabilities of the Common Carrier's Servants.—Sect. 8 of the statute provides that the act shall not protect the coachman, guard, book-keeper, or other servant of the common carrier from liability for losses or injuries occasioned by their own personal neglect and misconduct. This applies to liabilities *ex delicto*; for the coachman, guard, or other servant is not by the common law liable in any way *ex contractu* to the owner of the goods for loss or damage arising from his own personal negligence. The contract for the carriage of them is made with the common carrier or coach-proprietor who carries on the business, and not with a mere servant or agent, who has no interest in the concern, and does not share in the profits of the trade. Thus where an action was brought against a coach-porter for the value of a parcel lost by him, and also against the driver of a stage-coach for the loss of a trunk, it was held that as the defendant in each case had received the article as the servant and agent of the coach-proprietor, and not on his own account, he could not be sued by the owner of the goods for the loss. (*u*)

Losses occasioned by the Negligence of the Consignor—Defective Packing.—If the loss has been occasioned by the negligence of the consignor or his servants in not properly packing

(*r*) *McQueen v. Great Western Ry. Co.*, L. R. 10 Q. B. 569.

(*s*) *Vaughton v. London & North-Western Ry. Co.*, L. R. 9 Ex. 93.

(*t*) *Machu v. Lond. & South-West. Ry. Co.*, 2 Exch. 426.

(*u*) *Cavanagh v. Such*, 1 Pr. 331; *Williams v. Cranston*, 2 Stark. 82.

or securing the goods, the carrier is not responsible for the loss. If wine or spirits escape by reason of a defective bung in a cask, the carrier will not be answerable, (x) unless it be shown that the carrier had notice of the leakage, and had the means of stopping it, and neglected to do so, and that by reason thereof the plaintiff sustained the injury of which he complains. (y) If the defective packing of goods is patent and visible, and easily remedied, and the common carrier accepts the goods for conveyance, he is bound to take all reasonable means to provide for their safety. (z) But if the mode of packing is that in ordinary use, and the carrier is led by the sender's conduct to conclude that it is safe, the * carrier, at any rate if he is not a common carrier, will not be responsible for injury to the goods arising from such packing. (a)

A common carrier is liable as an ordinary bailee for negligence, and he is liable for a loss occasioned by negligence, even though the act of God or of the Queen's enemies conduces to the loss. He is also liable as an insurer for losses which occur through no negligence on his own part; but, like an insurer, he is not liable for accidents happening through the inherent vice of the thing carried. (b) Thus a common carrier is not liable for the loss of the goods carried arising from their inherent tendency to decay or ignite. (c) Nor is he liable for injury to animals, the result of some vice which, by its own internal development, affects the animal without any default nor negligence of the carrier. (d)

Railway and Canal Act — Inability of Railway, Canal, and Steamboat Companies to exonerate themselves from Liability for their own Neglect, Default, or Breach of Duty by Notice, Condition, or Declaration. — By sect. 7 (e) of the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, — which by 31 & 32 Vict. c. 119,

(x) *Hudson v. Baxendale*, 2 H. & N. 575.

(y) *Beck v. Evans*, 16 East, 244.

(z) *Stuart v. Crawley*, 2 Stark. 324.

(a) *Richardson v. North-Eastern Ry. Co.*, L. R. 7 C. P. 75; 41 L. J. C. P. 60.

(b) *Blower v. Great Western Ry. Co.*, *infra*.

(c) *Alston v. Herring*, 11 Exch. 822;

Rhol v. Parr, 1 Esp. 444; *Boyd v. Du-bois*, 3 Campb. 133.

(d) *Blower v. Gt. West. Ry. Co.*, L. R. 7 C. P. 655; 41 L. J. C. P. 268; *Kendall v. London & South-Western Ry. Co.*, L. R. 7 Ex. 373; 41 L. J. Ex. 184.

(e) See *Baxendale v. Gt. Eastern Ry. Co.*, L. R. 4 Q. B. 254.

sect. 16, extends, so far as its provisions are applicable, "to steam vessels and to the traffic carried on thereby," — every railway company and canal company is made liable for the loss of, or for any injury done to, any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, (*f*) forwarding, and delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any wise limiting such liability; every such notice, condition, or declaration being thereby declared to be null and void. But it is provided that nothing therein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable, (*g*) and that they shall not be liable to a greater extent than certain sums named in the section for injuries to horses, cattle, &c., unless the sender has declared them to be of *greater [*554] value at the time of delivery, and paid an increased charge accordingly.

Where an act of parliament authorized a railway company to make regulations respecting passengers' luggage, and the company by their regulations required the passengers to see their luggage marked with the company's labels, and stated that the company would not be responsible for the loss or detention of any article of luggage not so marked and properly addressed, and the plaintiff, who was a passenger, required the company's porter to label and take into the luggage-van some wearing apparel wrapped in a shawl and properly addressed, and the porter refused, as the company had made it a rule not to label shawls, it was held that the company was responsible for the porter's refusal to receive the shawl, and that the company could not make regulations having the effect of divesting them of their

(*f*) As to when a horse is "received," see *Hodgman v. West Mid. Ry. Co.*, 35 L. J. Q. B. 85; 6 B. & S. 560. (*g*) As to the construction of this section, see *Peek v. North Staff. Ry. Co.*, *post*, p. *556.

common law liability to receive and carry the article as personal luggage. (*h*)

In cases where railway companies under the Carriers' Act or the Railway Traffic Act are entitled to receive an increased rate of charge for insuring the safe conveyance of particular articles, and the consignor objects to the increased rate of charge, and it is agreed that the company shall receive and forward certain articles uninsured, this may be taken as doing away with their common law liability as insurers of the safe conveyance of the articles, but does not exempt them from responsibility for losses by negligence through their own default, (*k*) *e. g.* for delay in not forwarding the articles. (*l*)

If goods are accepted for conveyance under a special contract, whereby the carrier exempts himself from liability for loss or damage of a particular character, such as leakage or breakage, this will not exempt him from responsibility if the leakage or breakage has been caused by his own negligence, or the negligence of his servants in storing the goods. (*m*) And the rule is the same where the suit is brought in the Court of Admiralty against the vessel. (*n*) It makes no difference that the contract was made with another person, if the plaintiff's goods were lawfully in the possession of the defendants, and were lost or injured through their negligence. (*o*) Where the plaintiff's goods on board ship were injured by oil during the voyage, and it was shown that there was no oil amongst the cargo, but that [**555*] there were two donkey-engines * on board, in which oil was used, and which were near the plaintiff's goods, it was held that this raised a presumption of negligence against the owners of the vessel. (*p*)

Special Contracts with Railway and Canal Companies for the carriage of Goods and Chattels.—By the Railway and Canal

(*h*) *Munster v. South-Eastern Ry. Co.*, 4 C. B. N. s. 676; 27 Law J. C. P. 312. P. 168; 2 C. B. N. s. 163; *M'Manus v. Lanc. & Yorkshire Ry. Co.*, *infra*.

(*k*) *Peck v. North Staff. Ry. Co.*, 10 H. L. C. 473; 32 Law J. Q. B. 241. (*n*) *Ohrloff v. Briscall*, L. R. 1 P. C. Ca. 231.

(*l*) *Robinson v. Gt. Western Ry. Co.*, 35 L. J. C. P. 123. (*o*) *Martin v. Gt. Indian Peninsular Ry. Co.*, L. R. 3 Exch. 9.

(*m*) *Phillips v. Clark*, 26 Law J. C. L. R. 3 C. P. 14. (*p*) *Czech v. Gen. Steam Nav. Co.*,

Traffic Regulation Act (17 & 18 Vict. c. 31), it is further enacted by the same section (sect. 7) that no special contract between any railway or canal company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things, shall be binding upon or affect any such party unless the same be signed by him, or by the person delivering such animals, articles, goods, or things respectively, for carriage; but nothing therein contained is to alter or affect the rights, privileges, or liabilities of any such company, under the 11 Geo. IV. & 1 Wm. IV. c. 68, with respect to articles of the description mentioned in that act. Special contracts with railway and canal companies, therefore, for the carriage of merchandise and chattels, are placed under the control of the judges, so that the conditions imposed by the contract must be just and reasonable; and no condition, however just and reasonable, can protect the company, unless it be contained in a contract signed in accordance with the statute. (*q*) But no special contract signed according to the statute is necessary to define the nature and extent of the public profession of the common carrier and of the duties he undertakes in favor of the public at large; (*r*) and a contract not signed is valid as against the company. (*s*)

Before the statute, every case in which a special limited liability was substituted for the general common law obligation of the carrier, whether by notice acquiesced in or document signed by the customer, was one of special contract, and the statute is to be construed with reference to that state of the law; so that every notice, condition, and declaration under the statute, however reasonable, must be made in writing, and be signed in the mode provided by the statute, in order to be binding in law upon the person sought to be affected by it. (*t*) If a man has an oppor-

(*q*) *Peek v. North Staff. Ry. Co.*, 10 H. L. C. 473; 32 L. J. Q. B. 241; *Aldridge v. Gt. West. Ry. Co.*, 15 C. B. N. s. 582; 33 L. J. Q. B. 161; *All-day v. Gt. West. Ry. Co.*, 34 L. J. Q. B. 5; 5 B. & S. 903; *Lond. & North-West. Ry. Co. v. Dunham*, 18 C. B. 829; *McManus v. Lanc. & York. Ry. Co.*, 4 H. & N. 335; 28 L. J. Ex. 359.

(*r*) *Ante*, p. *525.

(*s*) *Baxendale v. Great Eastern Ry. Co.*, L. R. 4 Q. B. 244, 251; 38 L. J. Q. B. 137.

(*t*) *M'Manus v. Lanc. & York. Ry. Co.*, *supra*; *Peek v. North Staff. Ry. Co.*, *ut sup.*; *Simons v. Gt. West. Ry. Co.*, 18 C. B. 826; 26 Law J. C. P. 25; *Beal v. South Dev. Ry. Co.*, 5 H. & N. 886.

tunity of reading the conditions, and chooses to sign [*556] them without * reading them, he is nevertheless bound by them if they are reasonable. (u) But the act does not apply to traffic beyond the company's own lines or canals, so that a condition printed on a passenger's through ticket from London to Paris, that the company would not be responsible for loss, &c., except on the company's own lines, is valid, although not signed by the passenger. (x)

What are Unjust and Unreasonable Conditions in Special Contracts for the Carriage of Chattels by Railway or Canal. — The reasonableness or unreasonableness of the condition made by the company with respect to the receiving, forwarding, and delivering of goods and chattels, will materially depend upon the nature of the articles to be conveyed, the degree of risk attendant upon their conveyance, the rate of charge made, and whether the railway company was bound by the common law or by statute to carry the articles on being paid the customary hire, or whether it was in its power to reject them altogether and refuse to carry them upon any terms. (y) Whenever, in order to bring a railway or canal company within the protection of a condition or special contract, it is necessary to construe it as excluding responsibility for losses occasioned by the company's negligence and misconduct, the condition or special contract is unreasonable and unjust, and therefore void, unless an option is given to the customer to have the goods carried on the ordinary terms, at the ordinary rate. (z) Where the terms of the condition are unconditional, and would if valid protect the company even in the case of the wilful misconduct of the defendant's own servants, the condition is unreasonable. (a) Where the plaintiff sent a

(u) *Lewis v. Gt. West. Ry. Co.*, 5 H. & N. 874; 29 Law J. Exch. 425.

(x) *Zunz v. South-East. Ry.*, L. R. 4 Q. B. 539.

(y) *Pardington v. South Wales Ry. Co.*, 1 H. & N. 396; *Simons v. Gt. West. Ry. Co.*, 18 C. B. 805; *Garton v. Brist. & Ex. Ry. Co.*, El. B. & El. 112; 30 Law J. Q. B. 273. As to what is a reasonable percentage charge on declared value, see *Harrison v. Lond.*,

Brighton, & S. C. Ry. Co., 31 Law J. Q. B. 113.

(z) *Peek v. North Staff. Ry. Co.*, *supra*; *Lloyd v. Waterford & Lim. Ry. Co.*, 15 Ir. Com. Law Rep. Q. B. 37; *Allday v. Gt. Western Ry. Co.*, *supra*; *Rooth v. The North-Eastern Ry. Co.*, L. R. 2 Ex. 173; 36 L. J. Ex. 83.

(a) *Ashendon v. L. B. & S. C. Ry.*, 5 Ex. D. 190, where *Harrison v. L. B. & S. C. Ry.* is said to be overruled by *Peek v. N. S. Ry.*, *supra*.

cow and a heifer by the defendants' railway, and signed a cattle ticket, on the back of which were conditions that the company were to be free from all risk with respect to any loss or damage arising in the loading, transit, &c., or from any other cause whatever, and the owner was required to see to the efficacy of the wagons, and make complaint in writing before the wagon left the station, and the cow fell out of the truck, it was held that the whole of these conditions were unreasonable, as they showed a determination not to be held liable for any loss whatever; but conditions may * some of them be reasonable [* 557] and some not; and the plaintiff will be bound by those which are reasonable. (b) And where a railway company received goods to be carried under a condition absolving them from all liability for the loss of or damage to goods insufficiently or improperly packed, marked, directed, or described, the condition was held to be unreasonable and unjust, as insufficient packing, marking, or directing, &c., of goods constituted no sufficient ground for relieving the company from all liability respecting the performance of the duty they had undertaken to fulfil. (c)

Every stipulation or condition professing to exempt a railway company or canal company from liability for its own negligence or misconduct, or that of its servants and agents, is unjust and unreasonable. "It is impossible," justly observes Lord Ellenborough, "without outraging common sense, to allow carriers to say: 'We will receive your goods, but we will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious.'" (d)

Where horses were delivered to be forwarded by a cattle-truck from Liverpool to York for reward, and the owner was required to sign a ticket containing a memorandum to the effect

(b) *Gregory v. West Mid. Ry. Co.*, 2 H. & C. 951; 33 L. J. Ex. 155; *McCance v. L. & N. W. Ry. Co.*, 31 L. J. Ex. 65; *Simons v. Gt. West. Ry. Co.*, *ante*, p. * 555; see however, *per Martin, B.*, *Kirby v. G. W. Ry. Co.*, 18 L. T. 658.

(c) *Simons v. Gt. West. Ry. Co.*, *ante*, p. * 555; *Lond. & North-West.*

Ry. Co. v. Dunham, *supra*; *Garton v. The Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J. Q. B. 273.

(d) *Lyon v. Mells*, 5 East, 438; *Ld. Wensleydale in Peek v. North Staff. Ry. Co.*, 32 Law J. Q. B. 274; *Allday v. Gt. West. Ry. Co.*, 5 B. & S. 903; 34 L. J. Q. B. 5; and see *ante*, pp. * 535, * 553.

that the ticket was issued subject to the owner's undertaking all risk of conveyance, loading and unloading, as the company would not be responsible for any injury or damage, however caused, occurring to live stock travelling upon the railway, or in their vehicles, and the defendants' servants provided a truck which, in external appearance, and so far as the defendants' servants knew, was sound, and sufficient for the conveyance of the horses, but it was, in fact, unsound, and of insufficient strength for the purpose, and a hole was made in the bottom of the truck during the journey, and one of the horses got his leg through the hole and was injured, it was held that the railway company was responsible for the damage done to the horse, notwithstanding the terms of the special contract signed by the owner of the horse. "We are of opinion," observes the court, "that the condition or special contract in this case is not just and reasonable. In order to bring the defendants within its protection, it is necessary to construe it as excluding responsibility for loss occasioned not only by all risks of whatever kind directly [*558] incidental to the transit, but also for that * caused by the insufficiency of the carriages provided by the defendants, though occasioned by their own negligence or misconduct. The sufficiency or insufficiency of the vehicles by which the companies are to carry is a matter, generally speaking, which they, and they alone, have the means of fully ascertaining; and it would be unreasonable and mischievous if they were to be allowed to absolve themselves from the consequence of neglecting to perform properly that which seems naturally to belong to them as a duty. It is unreasonable that the company should stipulate for exemption from liability for the consequences of their own negligence, however gross, or misconduct, however flagrant; and that is what the condition under consideration professes to do. That condition is therefore void, and the case stands simply upon the ground that the plaintiff has employed the defendants to carry his horses safely, and that they have used an insufficient and improper vehicle for that purpose, whereby the horses have been injured." (e) A stipulation that

(e) *M'Manus v. Lanc. & Yorkshire West. Ry. Co.*, 7 H. & N. 477; 31 *Law Ry. Co.*, 4 H. & N. 327; 28 *Law J. J. Exch.* 65.
Exch. 353; *M'Cance v. Lond. & North-*

goods shall be carried "at owner's risk" only exempts the company from the ordinary risks incurred by goods in going along the railway, and does not cover injury from delay caused by the negligence of the company. (*f*)

The court is bound to look at the particular matter in each case, to see whether the condition is reasonable or not; and it has been held that a condition which seeks to relieve a railway company from the consequences of the loss or non-delivery of goods, by reason of insufficient or improper package, is not reasonable; (*g*) and if the condition is framed without limitation or exception, so as to exempt the company from all responsibility for injury, however caused, it will be void, as being neither just nor reasonable. (*h*)

It is the duty of every railway or canal company setting up a condition in qualification and restriction of their common law liability to make out that the condition is just and reasonable; and if they make an extra charge for insuring the safe conveyance of live animals, they must show that the extra charge is reasonable and just. (*i*)

It was held that where there was a contract that goods were to be carried "at owner's risk," the railway company were responsible * for delay in delivery, although a lower charge [* 559] than usual was made. (*k*) But where there was a similar contract, but the company were to be liable for the wilful misconduct of their servants, the company were held not responsible, there being no wilful misconduct, and that the contract was reasonable. (*l*) Where the company were not to be liable in respect of any loss or "detention," except by wilful misconduct, it was held that a purposed detention through a negligent mistake in supposing the carriage had not been paid, although not

(*f*) *Robinson v. Great Western Ry. Co.*, 35 L. J. C. P. 123; *D'Arc v. London & North-Western Ry. Co.*, L. R. 9 C. P. 325.

(*g*) *Simons v. Gt. West. Ry. Co.*, 18 C. B. 830; 26 Law J. C. P. 25; *Id.* *Wensleydale*, *Peek v. North Staff. Ry. Co.*, *supra*.

(*h*) *Peek v. North Staff. Ry. Co.*, *ante*, * 556; *Gregory v. West Mid. Ry. Co.*, 33 Law J. Exch. 155.

(*i*) *Harrison v. Lond. Br. & S. C. Ry. Co.*, *Garton v. Brist. & Ex. Ry. Co.*, *Peek v. North Staff. &c.*, *ante*, p. * 556.

(*k*) *D'Arc v. L. & N. W. Ry. Co.*, 9 C. P. 325, *ante*.

(*l*) *Lewis v. G. W. Ry.*, 3 Q. B. D. 195; see *Gordon v. Gt. Western Ry.*, 8 Q. B. D. 44.

amounting to wilful misconduct, was a "detention" for which the company was liable. (*m*)

What are Just and Reasonable Conditions.—It has been held that a condition that all claims for loss or damage should be made within seven days after the time when the goods have been delivered is just and reasonable; (*n*) also a condition that a railway company will not undertake to forward goods by any particular train, or be answerable for their non-arrival in time for any particular market; (*o*) and that they will not be responsible, under any circumstances, for loss of market or other loss or injury arising from detention of trains, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud; (*p*) or that they will not be responsible for the risks attendant upon the carriage by railway of perishable articles, live animals and chattels, such as accidents occasioned by the fright or restiveness of horses, or from the wheel of a carriage taking fire; (*q*) or loss arising from delay in forwarding fish, where it is impossible to know the exact condition of the fish at the time of its delivery to be carried, and where the slightest delay in its transmission may occasion a vast loss; (*r*) or to loss or damage to fragile materials, such as statuary or sculptured marbles, not occasioned by the negligence of the company or its servants. (*s*) If the company offer the consignor a *bona fide* practical choice, either to have his goods carried in the usual way, at a reasonable rate, or at his own risk at a lower rate, and he elects the latter, the condition is not unreasonable. (*t*) A condition annexed to a [*560] contract for the carriage of meat that the * company will not be responsible for loss of a market, is reasonable. (*u*)

(*m*) *Gordon v. G. W. Ry. Co.*, 8 Q. B. 44. If the defendants intended to say that they were not to be liable for such "detention," then the condition was unreasonable.

(*n*) *Lewis v. Gt. West. Ry. Co.*, 29 L. J. Ex. 425; 5 H. & N. 867.

(*o*) *Beal v. South Dev. Ry. Co.*, 5 H. & N. 875; 29 L. J. Ex. 441; *White v. Gt. West. Ry. Co.*, 2 C. B. N. s. 7; 26 L. J. C. P. 158; *Lord v. The Midland Ry. Co.*, L. R. 2 C. P. 339; 36 L. J. C. P. 170.

(*p*) *Beal v. South Dev. Ry. Co.*, 3 H. & C. 337.

(*q*) *Austin v. Manchester Ry. Co.*, 10 C. B. 475.

(*r*) *Beal v. South Devon Ry. Co.*, *supra*; *Wren v. East. C. Ry. Co.*, 35 Law T. R. Q. B. 5.

(*s*) *Peck v. North Staff. Ry. Co.*, *ante*, p. *556.

(*t*) *Blackburn, J.*, *ib.*; *Lewis v. G. W. Ry. Co.*, *supra*; *Brown v. M. S. & L. Ry. Co.*, 9 Q. B. D. 230.

(*u*) *Lord v. Midland Ry. Co.*, L. R. 2 C. P. 339.

The 17 & 18 Vict. c. 31, sect. 7, is extended by the 26 & 27 Vict. c. 92, and 31 & 32 Vict. c. 119, sect. 16, to steam-vessels employed by railway companies, as auxiliary to their line of railway, and to the traffic carried on by means of such steam-vessels. It applies to passengers' luggage (*w*), but not to goods received by the company for safe custody, and not for carriage. (*x*) Nor does it apply to a contract exempting a company from liability for loss on a railway not belonging to or worked by the company. (*y*) The 34 & 35 Vict. c. 78, sect. 12, applies where the carriage is by a vessel not belonging to nor worked by the company. (*z*)

Liability of a Railway Company during Sea Transit. — When a railway or canal company contracts by through booking to carry any animals, luggage, or goods from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage by sea of such animals, luggage, or goods from the act of God, the king's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, will, if published in a conspicuous manner in the office when such through booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such animals, luggage, or goods, be valid, as part of the contract between the consignor of such animals, luggage, or goods, and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. (*a*)

Where a railway company, under a contract for carrying persons, animals, or goods by sea, procure the same to be carried in a vessel not belonging to the company, they will be answerable in damages in respect of loss of life or personal injury, or in respect of loss or damage to such animals or goods during the

(*w*) *Cohen v. S. E. Ry.*, 2 Ex. D. L. R. 4 Q. B. 539; 38 L. J. Q. B. 253. 209.

(*x*) *Van Toll v. South-Eastern Ry. Co.*, 12 C. B. N. s. 75; 31 L. J. C. P. 241. 792.

(*a*) 31 & 32 Vict. c. 119, sect. 14,

(*y*) *Zunz v. South-Eastern Ry. Co.*, *post*, p. * 565.

carriage in such vessel, in like manner, and to the same amount, as they would be answerable if the vessel had belonged to them. (*b*)

Of the Implied Authority of the Servants of a Railway Company to bind the Company by Special Contract. — “It is the duty of railway companies to have some person capable of giving directions and of dealing with everything that the ex-
[* 561] gency of the traffic may * require, and of granting any reasonable demand. The persons who are said to be general superintendent and managing director have power to bind the company as to all things within the scope of the business of the company by any contract within the limits of their employment.” (*c*) If they act beyond the scope of their ordinary business, it must be shown, in order to bind the company, that they are acting under a special authority from the company, that is, the board of directors. (*d*) But if there is a particular course of dealing with which the consignor is acquainted, he must be taken to know that the servants have no power to bind the company on any but the usual terms. (*e*)

Commencement and Duration of the Liability — Damage or Loss of Goods in Warehouses. — When the common carrier of goods carries on the business both of a warehouseman and a common carrier, the nature and extent of his liability will depend upon the character in which he holds the goods at the time of the loss. If they are received into his warehouse to await the future orders of the owner or consignor as to their destination, he is clothed only with the ordinary duties and responsibilities of a warehouseman or bailee for hire. (*f*) Goods received at the cloak-room of a railway company, therefore, are not received by the company in their capacity of common carriers, but simply as bailees for hire. (*g*) But if the destination is marked out, and the carrier has nothing to do but to forward

(*b*) 34 & 35 Vict. c. 78, sect. 12,
post, p. * 565.

(*c*) *Brown v. Brist. & Ex. Ry. Co.*,
4 Law T. R. N. s. Ex. 830; *Robinson v.*
The Great West. Ry. Co., 35 L. J. C. P.
123.

(*d*) *Taff Vale Ry. Co. v. Giles*, 23 L.
J. Q. B. 43.

(*e*) *Slim v. Great Northern Ry. Co.*,
23 L. J. C. P. 168.

(*f*) *Cairns v. Robins*, 8 M. & W.
263; *Garside v. Trent Navigation Co.*,
4 T. R. 582.

(*g*) *Van Toll v. South-East. Ry. Co.*,
31 Law J. C. P.

the goods on the earliest opportunity to the place indicated, he is responsible as a common carrier for any loss or damage that may occur to the goods in the warehouse, as they are then *in transitu* in contemplation of law. (*h*) Whenever the common carrier receives goods to be kept until called for, or until he has orders from the consignee to forward them, he holds them as a bailee for hire, and not as a gratuitous bailee, although he does not charge warehouse rent. (*i*)

Delivery of Goods at the Place of Destination.—The common carrier of goods is bound, in common with all carriers for hire, to carry the goods intrusted to him for conveyance to their place of destination with reasonable expedition, (*k*) and deliver them into the hands of the consignee, or of some person

*expressly or impliedly authorized by him to receive [*562] them; and he must, of course, in all cases, take especial care that they are delivered into the hands of the right person. (*l*) If, however, carriers are imposed upon by a fictitious order, they will not be responsible if they act according to the usual custom of business, and in accordance with their instructions. (*m*) When the carriage is by land, the goods must be sent to the residence of the consignee, for the common carrier is not released from responsibility by leaving them at the coach-office, or at an inn by the road-side at which the coach usually stops, unless he has received directions from the consignee so to do. (*n*) If he tenders them at the residence of the consignee, and is ready to deliver them on receiving payment of his hire, he has fulfilled his contract as a carrier; and if the hire is not paid, he is not bound, as we have already seen, to part with the possession of the goods; but he may lawfully take them back to his own warehouse or place of business; and he holds them thencefor-

(*h*) *Forward v. Pittard*, 1 T. R. 27; Buller, J., in *Hyde v. Trent & Mersey Nav. Co.*, 5 T. R. 398; see *Ex parte Barrow*, 6 Ch. D. 783. As to accidental fires in warehouses, see Add. on Torts (5th ed., by Cave), p. 339 *et seq.*

(*i*) *White v. Humphery*, 11 Q. B. 43.

(*k*) *Raphael v. Pickford*, 6 Sc. N. R. 478; 2 Dowl. N. s. 916; *Black v. Baxendale*, 1 Exch. 410; 17 Law J. Exch. 50.

(*l*) *Golden v. Manning*, 3 Wils. 433; 2 W. Bl. 916; *Birket v. Willan*, 2 B. & Ald. 356; *Duff v. Budd*, 6 Moore, 469; *Stephenson v. Hart*, 1 M. & P. 357; 4 Bing. 476.

(*m*) If they are imposed upon by a fictitious order, see *McKean v. McIvor*, L. R. 6 Exch. 36.

(*n*) *Lond. & North-West. Ry. Co. v. Bartlett*, 7 H. & N. 400; 31 Law J. Exch. 92.

ward not as a common carrier, but as a bailee for hire, or (if he is not entitled to charge, or does not charge, warehouse rent) as a gratuitous bailee, (o) and is only liable, therefore, to act with reasonable care and caution with respect to the goods. (p) And if the consignee, having no warehouse of his own, asks him to keep the goods till he can conveniently send for them, the common carrier thenceforth holds the goods only as a warehouseman for hire or a gratuitous bailee, according as he may or may not be paid for his care and custody of them. (q) Upon the arrival of the goods at their destination, and tender of them to the consignee, the carrier is no longer a common carrier in the sense of being an insurer, but is bound nevertheless to take care of the goods; (r) and if he is put to expense in so doing by reason of the default of the consignee in not receiving the goods, the carrier may recover such expenses. (s) Where goods are delivered to be carried to a certain place for a named consignee, such consignee is entitled to delivery at any other place, and the carrier is not responsible for loss after such delivery. (t) The carrier is protected by the Carriers' Act after the goods have been [*563] negligently *carried beyond the destination. (u) When the carriage is by water, the delivery at a wharf is not a delivery to the consignee, unless it is made so by the usage and practice of the port where the delivery takes place; but the master is bound to give the consignee notice of the arrival of the goods, and is not released from his responsibility for their safety until a reasonable time has elapsed after the giving of the notice for the consignee to come and fetch them. He cannot escape from his liability as a common carrier by immediately landing the goods at a public wharf, without giving notice to the consignee and giving him an opportunity of receiving them from the ship's side; and if he does so land them, and they are

(o) *Storr v. Crowley*, M'Clel. & Y. Co. v. Swaffield, L. R. 9 Ex. 132; *Chapman v. G. W. Ry.*, 5 Q. B. D. 278; *Ex parte Cooper*, 11 Ch. D. 68.

(p) *Hough v. Lond. & North-West Ry.*, L. R. 5 Exch. 51.

(q) *In re Webb*, 8 Taunt. 449; 6 Moore, 500; see *Shepherd v. Bristol & Exeter Ry. Co.*, L. R. 3 Exch. 189.

(r) See the cases cited in *Smith on Negligence*, p. 104; and see *Gt. N. Ry.*

(s) *Gt. N. Ry. Co. v. Swaffield*, *supra*.
(t) *Cork Distillers Co. v. Great Southern Ry. Co.*, Ireland, L. R. 7 H. L. 269.

(u) *Morrit v. N. E. Ry. Co.*, 1 Q. B. D. 302.

destroyed upon the wharf by an accidental fire before the consignee has had an opportunity of taking them away, the ship-owners will be responsible for the loss. (*x*)

Delivery of Luggage at Railway Stations.—In the case of the carriage of passengers with luggage by railway, if it is the usual course for the luggage to be taken from the train by the company's servants and delivered to the passengers on the platform, the company is bound to deliver it there. And if the company choose to provide a more convenient mode of delivering luggage to passengers by employing porters to carry it across the platform to the vehicles by which it is to be taken away, their liability as common carriers continues until the porters have discharged their duty. (*y*) The passenger must be allowed a reasonable time to claim his luggage at the destination. (*z*) Passengers' luggage is within sect. 7 of the Railways and Canals Traffic Act, and a notice or condition that the company will not be responsible is void. (*a*)

Acceptance of Goods and Passengers to be carried beyond the Limits of the Ordinary Destination.¹—When a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, (*b*) that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although the place may be beyond the limits within which he ordinarily professes to carry on his trade of a carrier. His responsibility, therefore, continues to the door of

¹ Upon the various questions arising relative to connecting lines, see 1 Abb. Dig. Corp. tit. *Railroads*, VIII. 4; 2 ib. tit. *Railroads*, VII. 3; U. S. Dig. tit. *Railroads*; article, 14 West. Jur. 355; Insurance Co. v. Railroad Co., 104 U. S. 146; Lee Lin v. Terre Haute, &c. R. R. Co., 10 Mo. App. 125; Lesinsky v. Great Western Despatch, ib. 134; Marquette, &c. R. R. Co. v. Kirkwood, 45 Mich. 51; Halliday v. St. Louis, &c. Ry. Co., 74 Mo. 159; Keep v. Indianapolis, &c. R. R. Co., 9 Fed. Reporter, 625; Bussey v. Memphis, &c. R. R. Co., 13 Fed. Reporter, 330.

(*x*) Bourne v. Gatcliffe, 3 Sc. N. R. 1; Western Ry. Co., 16 C. B. 13. See 8 ib. 604; 7 M. & Gr. 850; Syeds v. ante, p. *544.
(*z*) Patscheider v. G. W. Ry., 3 Ex. D. 153.

(*y*) Richards v. Lond. & Brighton, &c., Ry. Co., 7 C. B. 839; 18 Law J.

C. P. 251; Butcher v. Lond. & South-
(*a*) Cohen v. S. E. Ry., 2 Ex. D. 253.
(*b*) That such a limitation is a reasonable one, see Aldridge v. Gt. Western Ry. Co., 33 Law J. C. P. 161.

the address to which the goods are destined, and he [*564] cannot release himself from such *responsibility by transferring the goods to another carrier, or sending them by another conveyance. (c) If a railway company, for example, accepts goods for conveyance to a particular destination, beyond the limits of its own line of railroad, and the goods are lost whilst in the hands of another railway company to whom they have been delivered to be forwarded on their journey, the first railway company is the party to be sued by the owner of the goods for the loss of them, (d) unless the company has by express contract limited its liability to loss and damage occurring on its own line of railway. (e) But a proviso in the contract exonerating the company from all liability in respect of loss of or damage to the goods occurring beyond the limits of its own line of railway, from the negligence of other companies to whom the goods have been delivered to be forwarded, is repugnant and void. (f)

In the absence of special circumstances, the responsibility of a railway company in and about the conveyance of goods accepted by them for delivery at a particular destination is the same, whether their own line extends the whole distance or stops at an intermediate point, and the railway companies carrying the goods beyond the limits of the first line of railway are, in respect of the conveyance and delivery of such goods, to be regarded as the agents of the railway company which originally received the goods. (g) The same principle applies to the conveyance of passengers (h) who are injured during the journey,

(c) *Garnett v. Willan*, 5 B. & Ald. 53.

(d) *Muschamp v. Lanc. & Preston Ry. Co.*, 8 M. & W. 421; *Watson v. Ambergate Ry. Co.*, 15 Jur. 448; *Collins v. Bristol & Exeter Ry. Co.*, 11 Exch. 790; 25 Law J. Exch. 185; *Brist. & Exeter Ry. Co. v. Collins*, 7 H. L. C. 234; *Wilby v. West. Corn. Ry. Co.*, 2 H. & N. 709; *Mytton v. Midland Ry. Co.*, 4 H. & N. 615; *Coxen v. Gt. Western Ry. Co.*, 5 H. & N. 274; 29 Law J. Exch. 165; *Hayes v. South-Western Ry. Co.*, 9 Ir. C. L. R. 474; *Webber v. Great Western Ry. Co.*, 34 Law J. Exch. 170.

(e) *Fowles v. Gt. Western Ry. Co.*, 7 Exch. 699; 22 Law J. Exch. 76; *Aldridge v. Gt. Western Ry. Co.*, *supra*; see *Zunz v. South-East. Ry.*, *ante*, p. * 556.

(f) *Brist. & Ex. Ry. Co. v. Collins*, 7 H. L. C. 321.

(g) *Crouch v. Gt. Western Ry. Co.*, 26 Law J. Exch. 345; *Scothorn v. South Staff. Ry. Co.*, 8 Ex. 345.

(h) *Blake v. Gt. Western Ry. Co.*, 7 H. & N. 987; 31 Law J. Exch. 346; *Buxton v. North-Eastern Ry. Co.*, L. R. 3 Q. B. 549.

although the negligence be that of the company over whose line the defendant company have running powers, and not of the defendants themselves. (*i*) And it applies to the commencement of the journey as well as its termination. Where, therefore, the contract was to carry the plaintiff from the shore to a hulk, and there wait till a vessel came to carry him to his destination, and he was injured while on board the hulk, it was held that the defendants were responsible, though the hulk did not belong to them, and they had only acquired by agreement the right to use it for the purpose of embarking passengers on board their vessels. (*k*)

* Railway companies may also enter into such arrange- [*565] ments with one another as to become agents for one another, and responsible for each other's acts, so that a contract to carry and deliver cattle made with one company may render the other liable for a breach occurring on the line of the latter. (*l*) If one railway company receives goods to carry part of the way, and then transfers them to another company to carry them to the place of destination, the agents of the latter company are agents of the first company for receiving notice of countermand; and if they receive such notice and pay no attention to it, the first company is responsible for the neglect. (*m*) The consignor may receive the goods at any stage of the journey, and may alter their destination at his pleasure. (*n*)

By the 31 & 32 Vict. c. 119, it is provided (sect. 14) that where a railway or canal company, or the lessees, owners, or managers of such company, by through booking contract to carry any animals, luggage, or goods partly by railway and partly by sea or canal, a condition exempting the company from liability for any loss or damage arising during the carriage by sea from the act of God, the king's enemies, fire, accidents from machinery, boilers, or steam, and all other accidents of seas, rivers, and

(*i*) *Thomas v. Rhymney Ry. Co.*, L. R. 5 Q. B. 226; 6 ib. 266. See *Foulkes v. Met. Ry. Co.*, L. R. 4 C. P. D. 267; 5 C. P. D. 157.

(*k*) *John v. Bacon*, L. R. 5 C. P. 437.

(*l*) *Gill v. Manchester, &c. Ry. Co.*, L. R. 8 Q. B. 186; 42 L. J. Q. B. 89.

(*m*) *Scothorn v. South Staff. Ry. Co.*, 8 Exch. 345; *Crouch v. Gt. West. Ry. Co.*, 27 L. J. Ex. 345; 3 H. & N. 201.

(*n*) *London & N. W. Ry. Co. v. Bartlett*, 7 H. & N. 400; 31 L. J. Ex. 92; *Butterworth v. Brownlow*, 19 C. B. n. s. 409; 34 J. C. P. 266.

navigation of whatever kind, shall, if published in a conspicuous manner in the office where the through booking is effected, and legibly printed on the receipt or freight note, be valid as part of the contract between the consignor and the company.

By the 34 & 35 Vict. c. 78, it is provided (sect. 12) that where a railway company under a contract for carrying persons, animals, or goods by sea, procure the same to be carried in a vessel not belonging to the railway company, the railway company shall be answerable in damages in respect of loss of life or personal injury, or in respect of loss of or damage to animals or goods, in like manner and to the same amount as the railway company would be answerable if the vessel had belonged to the railway company, provided that such loss of life or personal injury, or loss or damage to animals or goods, happens to the person, animals, or goods (as the case may be) during the carriage of the same in such vessel, the proof to the contrary to lie upon the railway company.

Effect of Giving the Carrier a Wrong Direction for the Delivery of the Goods. — If after the carrier has fulfilled his part [* 566] of the * contract by conveying the goods to the place to which they are directed, it should appear that there is no such person as the one to whom the goods are addressed, or if the consignee refuses them, then an entirely new contract arises by implication of law between the carrier and the consignor; the carrier holds the goods as the bailee of the consignor, and is bound to take due and ordinary care of them and to deliver them to the consignor on being paid his fair and reasonable charges, (o) but he is not liable for a subsequent mis-delivery of the goods if he acts with reasonable care. (p)

Refusal of Consignee to Receive the Goods — Liability of the Carrier as Bailee. — If the consignee refuses to receive the goods, or cannot be found, the carrier is not thereby exonerated from the duty of taking reasonable care of them and doing what is reasonable in the matter for the benefit of the consignor or the

(o) *Metcalf v. Lond. & Br. Ry. Co.*, 4 C. B. N. s. 318; 38 L. J. C. P. 335; *Heugh v. Lond. & North-West. Ry. Co.*, L. R. 5 Ex. 51; 39 L. J. Ex. 48; *McKean v. M'Ivor*, L. R. 6 Ex. 36; 40 L. J. Ex. 30.
(p) *Heugh v. London & North-Western Ry. Co.*, L. R. 5 Ex. 51; 39 L. J. Ex. 4, 8.

owner of them. If the person to whom they are addressed is not ready to receive them at the place of delivery, the carrier must keep them a reasonable time, if he has a convenient place of deposit there, and if he has no place of deposit he must deal with them as any reasonably prudent person might be expected to deal with his own property. If the consignor or owner of the goods is known to him, it would be reasonable to expect that he would give him notice of the refusal of the consignee to receive them, and seek instructions for the disposal of the property. If the consignor or owner is unknown to him, no such notice can, of course, be given, or be reasonably expected; (*q*) but he should deposit the goods in some place of safety, and ought not at once to send back the goods to the place from whence they came. (*r*)

Payment of the Fare or Hire — Carrier's Lien.¹ — When credit has not by the express contract of the parties been given for the payment of the price of the carriage of goods, the delivery of the goods to the consignee and the payment of the price of the carriage of them are concurrent acts, to be performed at the same time, so that the carrier is entitled to retain possession of the things he has carried until he receives or is tendered his hire for their conveyance. If the consignee refuses to pay the sum demanded for the carriage of them, the carrier is not justified in at once sending them back to the place from whence they came, but must hold *them a reasonable [*567] time, to see if the consignee will accept and pay for them. (*s*) If he still refuses, the carrier then holds them at the disposal and for the benefit of the consignor, and is entitled to look to the latter for the payment of his hire. The carrier holds the goods, first that he may get payment of the freight, and then to deal with them as the consignee may direct. (*t*) The transit

¹ For a recent and interesting decision, that a railroad company cannot detain a passenger after his trip is completed, to compel him to surrender a ticket or pay fare, for so doing amounts to assuming authority to imprison him for debt, see *Lynch v. Metropolitan Elevated R. R. Co.*, 15 N. Y. Week. Dig. 317.

(*q*) *Hudson v. Baxendale*, 27 Law J. Exch. 93.

(*r*) *Gt. Western Ry. Co. v. Crouch*, 3 H. & N. 169; 27 Law J. Exch. 345; *Heugh v. L. & N. W. Ry.*, L. R. 5 Ex. 51; 39 L. J. Ex. 48.

(*s*) *Gt. West. Ry. Co. v. Crouch*, 3 H. & N. 201; s. c. *Crouch v. Gt. West. Ry. Co.*, 27 L. J. Ex. 345.

(*t*) *Ex parte Barrow*, 6 Ch. D. 783.

is not at an end so long as the carrier holds the goods as carrier, nor until by agreement between him and the purchaser he holds them not as carrier, but as the purchaser's agent. (*u*) Where a carrier delivers part of the goods, it may be assumed that he has not abandoned his lien upon the rest for his unpaid freight. He is bound to deliver up to the extent of the freight which has been paid; but the moment he has delivered enough to satisfy that, he has his lien upon the whole of the remainder of the cargo for the unpaid balance of the freight. (*x*) If a railway company makes and posts at the offices and stations a by-law to the effect that every passenger who loses his ticket shall be liable to pay the full fare from the most distant station on the line, the company has no power to enforce the by-law by detaining the person of a passenger who has lost his ticket and refuses to pay the specified amount. (*y*)

The common law accords to common carriers, who are bound, as we have seen, to receive and carry the goods of persons who tender them for conveyance, and are ready and willing to pay the customary hire, a right to retain the goods and chattels of such persons until they have received the customary remuneration for the services they have been compelled to render them, whether the goods are the property of the persons who have tendered them for conveyance, or the property of third parties from whom they have been fraudulently taken or stolen. Thus where goods were stolen and delivered to a carrier to be carried to Exeter, and the owner, finding them in the possession of the carrier, demanded them of him, and the carrier refused to deliver them without being paid the price of their carriage, it was held that he was justified in so doing, "for when the robber brought them to him, he was obliged to receive them and carry them; and, therefore, since the law compelled him to carry them, it will give him remedy by retainer for the price of the carriage." (*z*)

But the carrier has no right of lien by the common [**568*] law for *anything beyond the price of the carriage

(*u*) *Ex parte* Cooper, 11 Ch. D. 68.

(*x*) *Ex parte* Cooper, *supra*.

(*y*) *Chilton v. Lond. & Croyd. Ry. Co.*, 16 M. & W. 212; 16 L. J. Ex. 89; *Poulton v. L. & N. W. Ry. Co.*, L. R.

2 Q. B. 534. See Add. on Torts (5th ed., by Cave), p. 139.

(*z*) *Exeter Carrier's Case*, cited 2 Ld. Raym. 867.

of the goods conveyed. He cannot detain them until he has received payment of a general balance due to him from the owners of such goods. Common carriers have oftentimes attempted to obtain a lien of this description, and to secure the payment of debts due to them for the previous conveyance of goods, by giving notices to the effect that all goods delivered to them for conveyance will be held as a security for the payment of such debts, as well as for the payment of the price of their own carriage. (a) But the common carrier has no right to make any such bargain or stipulation. He is bound, as we have already seen, so long as he has room in his cart or carriage, to convey the goods of all persons on being tendered his hire for the carriage of the particular goods sought to be conveyed; and if he does obtain a promise from the consignor to the effect that he shall, if he carries the goods, have a right to retain them in his hands as a security for the payment of an antecedent debt, such promise is a mere *nudum pactum*, of no force or effect in the eye of the law. (b) Where an Order in Council under an act of parliament (c) directed that every cattle-truck should be disinfected once in every twenty-four hours during its use, it was held that the railway company had no lien for the expense of such cleansing upon the person sending cattle by the truck, as it was not a service done for such person individually as distinguished from the rest of the public. (d)

The 97th section of the 8 Vict. c. 20, gives no lien upon goods for tolls or charges due to a railway company for other goods previously conveyed by them as carriers, but only for tolls previously due for the use of the line by persons conveying goods in their own carriages. (e)

If a person goes to a coach-office and orders a place to be booked for him by a particular coach, and that be done, and he then leaves his portmanteau at the coach-office, the coach-proprietor will, it seems, have a lien upon the portmanteau for his

(a) Wright v. Snell, 5 B. & Ald. 353.

(b) Butler v. Woolcott, 2 B. & P. N. R. 64; Oppenheim v. Russell, 3 B. & P. 47; Rushforth v. Hadfield, 6 East, 527; 7 ib. 227.

(c) 11 & 12 Vict. c. 107. This act is repealed by the 32 & 33 Vict. c. 70,

and see now 41 & 42 Vict. c. 74, ante, p. * 527.

(d) Cox v. Gt. Eastern Ry. Co., L. R. 4 C. P. 181.

(e) Wallis v. L. & S. W. Ry., L. R. 5 Exch. 62.

reasonable and customary remuneration and charge for booking ; but if the person merely leaves his portmanteau, and no place is booked, the coach-proprietor has no lien upon the portmanteau at all. (*f*) When goods delivered to be carried are received from the wagon of the common carrier by the consignee, [* 569] and are merely carried * into the warehouse to be weighed, the carrier has no right to charge for warehouse-room ; and if the goods are taken up on the road, and have never been booked, he has no right to charge for the booking of them ; and if, after tender of the price of the carriage, he detains them for these small charges, the detention is unlawful, and an action may be brought against him in respect thereof. (*g*) A common carrier of passengers and luggage has a right of lien upon the luggage for the payment of the fare of the passenger as well as for the carriage of his effects ; but he has, of course, no right to detain the person of the passenger or the clothes he is actually wearing. (*h*) And if the carrier once parts with the possession of the goods he loses his lien, as in other cases. But if he loses the possession by fraud, the lien revives if possession is recovered. (*i*)

Common Carrier's Charges — Railway Charges¹ — By-laws.—

The statutes requiring justices of the peace to assess and fix the price of all land carriage of goods have long since been repealed ; (*k*) but the hire or charge for the carriage must be fair and reasonable, and must not exceed the ordinary and customary rate of remuneration. If a person sends to a carrier's office to know his rate of charge, the carrier is bound by the representation there made by his clerks ; and if goods are sent upon the faith of such representation, the carrier cannot charge more than the sum named, although the clerk may have inadvertently fallen into a mistake. (*l*) When by a railway act it is enacted

¹ For discussions of discrimination in railroad freights, see an article on Extortionate traffic rates, by A. Hamilton, 16 Am. L. Rev. 446, ib. 818; Southern Express Co. v. St. Louis, &c. Ry. Co., 10 Fed. Reporter, 210; Hays v. Pennsylvania Co., 12 ib. 309.

(*f*) Higgins v. Bretherton, 5 C. & P. 194.
 2. Whether, if the place be booked, the coach proprietor would also have a lien for the full amount of the fare, *quære*, s. c.
 (*g*) Lambert v. Robinson, 1 Esp. 119.
 (*h*) Wolf v. Summers, 2 Campb. 631.
 (*i*) Wallace v. Woodgate, Ry. & M.
 (*k*) 7 & 8 Geo. IV. c. 39 (repealed).
 (*l*) Winkfield v. Packington, 2 C. & P. 600.

that the word "toll" shall include the charge for goods conveyed by the railway, whether for the use of the railway or for the moving power, or for the use of the carriage, *prima facie* it includes everything that a carrier does, and for which he is entitled to charge. (m) By the acts of parliament under which railway companies are incorporated, it is generally provided that the charges for the carriage of goods shall be reasonable and equal to all persons.

Duty of Railway and Canal Companies to afford Reasonable Facilities for the Carriage of Passengers, Merchandise, and Chat-tels.—By the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), it is enacted (sect. 2) that every railway company and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of * carriages, trucks, boats, [* 570] and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; (n) and every railway company and canal company having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals to the other, without any unreasonable delay, and without any such preference, or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by

(m) *Pegler v. Monm. Ry. & Can. Co.*, Law J. Exch. 18; L. R. 4 Eng. & Ir. 6 H. & N. 644; 30 L. J. Ex. 249. App. {226; 38 Law J. Exch. 107; see

(n) *Sutton v. Gt. West. Ry. Co.*, 35 *post*, p. * 572.

means or the railways and canals of the several companies, be at all times afforded to the public. It has been held, however, that the above section applies only to the "receiving," "forwarding" and "delivering" of traffic, and not to facilities for storing goods after they have been delivered to the consignees. Where, therefore, a railway company let the surplus land adjoining their station to one coal merchant to the exclusion of others, it was held that another coal merchant had no ground of complaint, although the first-named merchant did not require or use the whole of the surplus land for the purpose of storing his coals. (*o*)

Where a railway company acted as a common carrier of goods, and issued certain scales of charge for the carriage, including the collection, loading, unloading, and delivery, and also carried goods for other carriers, to whom they made certain allowances for collection, &c., but in their dealings with a particular carrier they refused to make these allowances, it was held that the charges to the latter were not equal or reasonable, and that he might recover from the company divers extra charges paid by him over and above what had been charged to other carriers and to the public, such payments not being voluntary, but made in order to induce the company to do that which they were by law

[*571] bound to do * without requiring such payments. (*p*) No distinction must be made by the company between one class of persons and another. (*q*) The company cannot, therefore, charge a person who is himself a common carrier, for a parcel or package, whatever may be its contents, more than it would charge one of the public. (*r*) Charges for collection and delivery of parcels cannot be included in the general charge for the

(*o*) *West v. L. & N. W. Ry.*, L. R. 5 C. P. 622, *per* Montague Smith and Brett, JJ., *diss.* Bovill, C. J., and Keating, J. As to the forwarding, &c., of through traffic from one line to another, see *Railway Regulation Act, 1873*, 36 & 37 Vict. c. 48, sect. 11.

(*p*) *Parker v. Great Western Railway Company*, 7 M. & Gr. 253; 7 Sc. N. R. 835; 11 C. B. 545; 21 L. J. C. P. 57; *Parker v. Brist. & Ex. Ry. Co.*, 6 Exch. 702; L. & N. W. Ry. *v. Evershed*, 3 Ap. Cas. 1029.

(*q*) See *Ransome v. East. Co. Ry. Co.*, 26 Law J. C. P. 91. It seems that the convenience of the public is an element in the consideration of what may constitute an "undue" preference; see *Palmer v. Lond. & Brighton Railway Co.*, L. R. 6 C. P. 194.

(*r*) *Parker v. Great Western Railway Company*; *Parker v. Bristol & Exeter Railway Company*, *London & North-Western Railway v. Evershed*, *supra*.

carriage, so as to impose upon parties who do not require these services and do not avail themselves of them the burthen of paying for them. (*s*) No unreasonable preference or advantage can lawfully be given to any particular person or company, or to any particular description of traffic. (*t*) But the fair interests of the railway company must be taken into consideration; and they are entitled to make a difference in their charges, where it is shown that there is a difference in the cost of carriage to the company, and in the labor and expense incurred by them in the delivery of the goods. (*u*)

If overcharges are made, they may be recovered back. (*x*) Therefore, where a railway company charged a certain rate upon the *aggregate* weight of several packages, if addressed to the same consignee at the same place, it was held that they could not charge a common carrier *separately* upon the weight of the packages consigned to him, although, in addition to the carrier's address on the packages, there was also labelled the address of the person to whom the carrier (through his agent) intended to deliver them. (*y*) However, this will not prevent a railway company from charging through rates to places beyond their termini at a rate lower in proportion than that charged for part of the distance, although such part is the whole of their line, and a common carrier is not, therefore, entitled to have his packages carried over the line for such lower rate. (*z*)

The 31 & 32 Vict. c. 119, provides (sect. 16) for equal charges to passengers where a railway company is authorized to maintain * and work steam vessels in communica- [*572] tion with their railway, and prohibits any reduction or advance in the fare in consequence of the persons using the steamboat having travelled, or being about to travel, by the rail-

(*s*) *Baxendale v. Gt. West. Ry. Co.*, 16 C. B. N. s. 137; 33 L. J. C. P. 197; *Garton v. Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J. Q. B. 273.

(*t*) 17 & 18 Vict. c. 31, sect. 2; see *L. & N. W. Ry. v. Evershed*, 3 Ap. Cas. 1029.

(*u*) *Ransome v. E. Co. Ry. Co.*, 1 C. B. N. s. 437; *Oxlade v. North-East. Ry. Co.*, ib. 454; *Baxendale v. East. Co. Ry. Co.*, 4 C. B. N. s. 81; 27 L. J. C. P.

137. As to tonnage rates and parcel rates, see *Parker v. Gt. West. Ry. Co.*, 6 Ell. & Bl. 103.

(*x*) *Pegler v. Monmouth, &c. Ry. Co.*, 6 H. & N. 644; *Garton v. Bristol & Exeter Ry. Co.*, 30 Law J. Q. B. 273; *L. & N. W. Ry. v. Evershed*, *supra*.

(*y*) *Baxendale v. Lond. & South-West. Ry. Co.*, L. R. 1 Exch. 137.

(*z*) s. c.

way or not. Where an aggregate sum for the fare by boat and rail is charged, the ticket must distinguish the amount charged for each (*Ibid.*). Where two railways are worked by one company, the calculation of charges by distance must be reckoned as if it was one railway (sect. 18). As to agreements between railway and canal companies, see 36 & 37 Vict. c. 48, sect. 16.

Carriage of Packed Parcels.¹—A railway company has no right to make an increased charge for packed parcels, in order to prevent carriers from entering into competition with them in the conveyance of goods; and there is no difference between a packed parcel sent to an individual containing parcels belonging to a variety of people, and parcels sent to an individual, all the contents being his own. (a) But in certain cases an extra charge might be made for increased risk; (b) and if the company has to make separate deliveries to several different persons, they are entitled to make an additional charge in respect of the increased trouble. (c) When the duty of making equal charges to all persons is not imposed upon the company, they may impose a different rate of carriage for packed parcels from what they charge for ordinary packages. (d)

¹ For recent discussions of the obligation of railroad companies to furnish transportation to express companies desiring carriage over their routes, see *Southern Exp. Co. v. Nashville, &c. Ry. Co.*, 20 Am. Law Reg. n. s. 590, and note by F. P. Prichard, *ib.* 602; s. c., 2 Fed. Reporter, 265; *Southern Exp. Co. v. Memphis, &c. R. R. Co.*, 2 McCrary, 570; *Dinsmore v. Louisville, &c. Ry. Co.*, 2 Fed. Reporter, 465; *Dinsmore v. Louisville R. R. Co.*, 3 Fed. Reporter, 593; *Southern Exp. Co. v. Louisville, &c. R. R. Co.*, 4 Fed. Reporter, 481; *Texas Exp. Co. v. Texas, &c. Ry. Co.*, *ib.* 427; *Southern Exp. Co. v. St. Louis, &c. Ry. Co.*, 10 Fed. Reporter, 210.

Compare *Coe v. Louisville, &c. Ry. Co.*, 3 Fed. Reporter, 775, where a like question arose between a stockyard company and a railroad. That a railroad company may not give a telegraph company exclusive privileges, see *Western Union Tel. Co. v. Kansas Pacific Ry. Co.*, 4 Fed. Reporter, 284; *Western Union Tel. Co. v. Burlington, &c. Ry. Co.*, 11 Fed. Reporter, 1, and note by F. Wharton, *ib.* 10; *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160.

(a) *Pickford v. Grand Junc. Ry. Co.*, 10 M. & W. 399; *Crouch v. Gt. North. Ry. Co.*, 11 Exch. 755; *Piddington v. S. E. Ry. Co.*, 5 C. B. n. s. 120; 27 L. J. C. P. 295; *Baxendale v. The London & South-Western Ry. Co.*, L. R. 1 Ex. 137; 35 L. J. Ex. 108; *Garton v. Brist. & Exeter Ry. Co.*, *supra*; *Great Western Ry. Co. v. Sutton*, L. R. 4 H. L. 226; 38 L. J. Ex. 177.

(b) *Garton v. Bristol & Ex. Ry. Co.*, 4 H. & N. 49; 28 L. J. Ex. 169.

(c) *Baxendale v. East. Co. Ry. Co.*, *supra*.

(d) *Branley v. S. E. Ry. Co.*, 30 L. J. C. P. 286; 12 C. B. n. s. 63.

In some cases deciding that an extra charge may be made for packed parcels, the company claimed to charge extra to carriers for packed parcels, and not to charge extra to customers who were not carriers, for what they called inclosures, which were in reality packed parcels, and the courts have held that an extra charge for a packed parcel to a carrier was against the statutes imposing upon railway companies the duty of charging equally to all persons in respect of all goods of a like description ; (e) but the company has a right to divide goods into classes by descriptions appropriate to the different classes it chooses to make, and to make different charges for the different classes. (f) By 31 & 32 Vict. c. 119, sect. 17, it is provided that, on application by writing to the secretary of the company by any person who has paid for the conveyance of * goods, the company shall [* 573] render an account to the applicant distinguishing how much of the charge is for conveyance,—including tolls for the use of the railway, the use of carriages, and for locomotive power,—and how much for loading and unloading, covering collection, delivery, and other expenses, but without particularizing the items of such last-mentioned charge.

Injunction against Railway Companies to enforce Compliance with the Railway and Canal Traffic Act.—By 17 & 18 Vict. c. 31, sect. 3, it is enacted that it shall be lawful for any company or person complaining against any railway company or canal company of anything done, or any omission made in contravention of the Railway and Canal Traffic Act, to apply in a summary way to the Court of Common Pleas, or any judge thereof (see note (g) *infra*), and that it shall be lawful for the court or judge to hear and determine the matter of the complaint, and to make inquiry in the mode therein directed, and to issue a writ of injunction or interdict, restraining such company or companies from further continuing such violation or contravention of the act, and enjoining obedience to the same ; (g) and in case of disobedience of any such writ of injunction or interdict, to

(e) *Parker v. Gt. Western Ry. Co.*, 11 C. B. 545; *Crouch v. Gt. Northern Ry. Co.*, 11 Exch. 742; 25 Law J. Exch. 137; *Gt. West. Ry. v. Sutton*, L. R. 4 Eng. & Ir. App. 226.

(f) *Erle, J., Branly v. South-Eastern Ry. Co.*, 12 C. B. N. s. 63; 31 Law J. C. P. 290.

(g) See *Ransome v. East. Co. Ry. Co.*, 26 Law J. C. P. 91.

order that a writ of attachment or any other process of such court incident or applicable to writs of injunction or interdict, shall issue against any one or more of the directors of any company, or against any owner, lessee, contractor, or other person failing to obey such writ of injunction or interdict; and to make an order directing the payment by any one or more of such companies of a sum of money not exceeding for each company the sum of £200 for every day, after a day to be named in the order, that such company or companies shall fail to obey such injunction or interdict, such moneys to be payable as the court or judge may direct, either to the party complaining, or into court, to abide the ultimate decision of the court, or to her Majesty; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order, in the nature of a writ of execution; and in any such proceeding, the court or judge may order and determine that all or any costs thereof or thereon incurred shall be paid by or to the one party or the other, as the court or judge shall think fit. (*h*)

“It is abundantly clear,” observes Cockburn, C. J., “from the statutory enactments which enjoin on railway companies the obligation to afford accommodation on equal and reasonable terms, and from the provisions of the statute by which jurisdiction is given to the Court of Common Pleas against the affording of undue *preference, or the imposing of undue prejudice or disadvantage, that it was not the intention of the legislature to leave to railway companies the unfettered exercise of their rights as proprietors of their respective lines; but in return for the great powers which it has conceded to them, and for the monopoly of the carrying business of the country, which in a great degree they have been enabled to acquire, has imposed on them the obligation of affording accommodation on equal terms to the whole of the public;” and they cannot promote their own interest as carriers at the expense of the right of the public to that equality, (*i*) or give to one individual greater

(*h*) These powers are now exercised by the Railway Commissioners under the 36 & 37 Vict. c. 48, in certain cases, and their orders may be enforced by the court.

(*i*) *Baxendale v. Gt. Western Ry. Co.*, 5 C. B. N. S. 354; 23 Law J. C. P. 69.

advantages at their stations, (*k*) or upon their line, than they allow to another. (*l*)

Where a railway company, in order to compete with a particular carrier in the collection and delivery of parcels, makes a man who has his own wagons and horses, and therefore does not require the company to collect and deliver parcels for him, pay more than he ought to pay for the transit on the railway, it is a case of undue prejudice against the person not wanting the accommodation. The company have no right to make a charge nominally for carriage upon the railway, which is in reality for that and something else, and so impose upon a portion of the public services which they do not desire to avail themselves of. (*m*) So if a number of tradesmen in a country town request a railway company to deliver all goods addressed to them to a local carrier for distribution by him, the company cannot, in order to compete with that carrier, under the pretence of requiring a special order as to each package, in effect cause the delivery by such carrier to be so delayed as to become impracticable. (*n*) Nor can a railway company exclude carriers' vans from the delivery of goods at a station after a certain hour, if they admit vans, with goods collected from their own receiving houses, after that hour. (*o*)

In execution of the powers conferred on them by this statute, the courts will issue writs of injunction, enjoining railway companies proved to have given an undue preference to one person or set of persons over another in respect of the conveyance of particular classes or descriptions of commodities, to desist from giving *such undue preference. (*p*) But [* 575] the operation of the statute is confined to undue preferences given to one person or class of persons over another in the

(*k*) *Marriott v. Lond. & S. W. Ry. Co.*, 1 C. B. N. s. 499; 26 Law J. C. P. 154; *Beadell v. East. Co. Ry. Co.*, ib. 250; *Baxendale, In re*, 11 C. B. N. s. 787; 12 ib. 758. ib. 137; 33 Law J. C. P. 197; see 31 & 32 Vict. c. 119, sect. 17, *ante*, p. * 572.

(*l*) *Baxendale v. North Devon Ry. Co.*, 3 C. B. N. s. 324; see 31 & 32 Vict. c. 119, sect. 16, *ante*, p. * 571. (*n*) *Parkinson v. Gt. Western Ry.*, L. R. 6 C. P. 554.

(*m*) *Cockburn, C. J., Garton v. Gt. Western Ry. Co.*, 5 C. B. N. s. 678; *Baxendale v. Gt. Western Ry. Co.*, 16 ib. 162; 3 C. B. N. s. 693; 27 Law J. C. P. 162; *Ransome v. East. Co. Ry. Co.*, ib. 166; 8 C. B. N. s. 709; *Cooper v. Lond. & S. W. Ry. Co.*, 27 Law J. C. P. 324.

traffic along the same railway or canal, (*q*) and travelling between the same places, and not to superior advantages which may be given to one town over another town on the same line of railway. (*r*) And it has been held that the statute is not contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities and full train-loads at regular periods, provided the real object of the railway company be to obtain thereby a greater remunerative profit by the diminished cost of the carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee. (*s*)

Before the court will put the powers of the Railway and Canal Traffic Act in motion, as regards the granting of an injunction, the court must in general be satisfied that some substantial injury or inconvenience is sustained by the public by the act complained of, and that the complaint is *bona fide* made on behalf of the public. (*t*) And it has been held that, the exercise of this special jurisdiction being subject to no review, and depending in each instance upon the special facts of the case, cases previously decided under it are not binding on the court in the same way that precedents in law are binding. (*u*)

Passenger Fares — Right of a Passenger to alight at Intermediate Stations.¹— Where a railway company, under the influence

¹ The drift of the decisions sustains the view that for a passenger to attempt to climb upon a car after the train has started, or to jump from it before it has stopped, is such negligence on his part as deprives him under ordinary circumstances of any claim against the company for a personal injury sustained. This conduct is presumably negligent. Ordinarily, the passenger must find his way to the cars before the train starts; and must wait, for leaving them, until it has come to a standstill. Special circumstances must exist to excuse him in a departure from this general rule. A passenger does not necessarily act at his own risk in leaping upon or from a moving train; but he must be prepared to show unusual facts in order to cast the risk upon the company. *Achison, &c. R. R. Co. v. Flinn*, 24 Kan. 627; *Delaware, &c. R. R. Co. v. Napheys*, 90 Pa. St. 125; *Wilson v. Northern Pacific R. R. Co.*, 26 Minn. 278; *Strauss v. Kansas City,*

(*q*) *Bennett v. Manch., Sheff. & Linc. Ry. Co.*, 6 C. B. N. s. 715.

(*r*) *Jones v. East. Co. Ry. Co.*, 3 C. B. N. s. 718.

(*s*) *Nicholson v. Gt. Western Ry. Co.*, 5 C. B. N. s. 441; *Strick v. Swansea Canal Co.*, 31 Law J. C. P. 240.

(*t*) *Painter v. Lond. & Br. Rail. Co.*, 2 C. B. N. s. 702; *Re Caterham Ry. Co.*, 1 C. B. N. s. 410.

(*u*) *Palmer v. Lond. & South-West. Ry. Co.*, L. R. 1 C. P. 589; *diss. Willes and Keating, JJ.*

of competition, charged a low rate of fare to a distant locality, and sought to prevent passengers from getting down at intermediate stations, to which a higher fare was charged, on the ground that they had not paid the fare to such intermediate station, and were answerable to a by-law subjecting to a penalty any person who should enter a carriage without having previously paid his fare, it was held that the by-law was wholly inapplicable; that the passenger had paid his fare; and that the company had no right to prevent him from getting down at any intermediate station. (x)

Duties and Responsibilities of Common Ferryman.—A common ferryman is a common carrier, and is bound to provide safe and * secure ferry-boats, and safe slips and landing- [* 576] stages, and all proper means and appliances for the safe transit of persons who may have occasion to use the ferry for themselves, or for the transit of their horses and carriages, luggage and merchandise. Where, therefore, the defendants, as ferrymen, used steamboats for transit across the River Mersey, from which passengers and animals could not safely land without landing-stages and slips, and they provided an insecure hand-rail to a landing-stage, which broke and caused the death of the plaintiff's mare, it was held that they were bound to make good the loss. (y)

Loss of Goods by Common Ferrymen and Common Hoymen.—Common ferrymen and common hoymen, being common carriers, are responsible for the safe delivery of goods intrusted to them for conveyance, unless they have been prevented by storm, lightning, tempest, or inevitable accident. (z) In *Mouse's case* it was

&c. R. Co., 14 Cent. L. J. 355; *Jewell v. Chicago*, &c. R. R. Co., 13 Reporter, 767; *Kelly v. Hannibal*, &c. R. R. Co., 70 Mo. 604; *Commonwealth v. Boston*, &c. R. R. Co., 23 Alb. L. J. 125; *Cotter v. Frankford*, &c. Ry. Co., ib. 124; *Phillips v. Rensselaer*, &c. R. R. Co., 49 N. Y. 177; *Georgia R. R. &c. Co. v. McCurdy*, 45 Ga. 288; *Gavett v. Manchester*, &c. R. R. Co., 16 Gray, 501; *Loyd v. Hannibal*, &c. R. R., 53 Mo. 509; *Doss v. Missouri*, &c. R. R. Co., 59 Mo. 27; *Lucas v. New Bedford*, &c. R. R. Co., 6 Gray, 84.

(x) *Reg. v. Frere*, 4 Ell. & Bl. 598. As to the construction of this by-law, see *Jennings v. Gt. Northern Ry. Co.*, L. R. 1 Q. B. 7; *Dearden v. Townsend*, ibid. 10.

(y) *Willoughby v. Horridge*, 12 C. B. 751; 22 Law J. C. P. 90.

(z) *Amies v. Stevens*, 1 Str. 128; *Bac. Abr. Carriers* (B); *Oakley v. Portsmouth*, &c. Steam Packet Co., ante, p. * 532.

resolved "that if the ferryman surcharge the barge, it is lawful for any of the passengers in time of accident and necessity to cast the things out of the barge for safety of the lives of the passengers; and the owners shall have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge; but if no surcharge was, but the danger accrued only by the act of God, as by tempest, no default being in the ferryman, every one ought to bear his loss for the safeguard and life of a man, for 'interest reipublicæ quod homines conserventur.'" (a)

Season Ticket¹ — **Conditions** — **Forfeiture of Deposit**. — The plaintiff purchased a season ticket, and agreed to be bound by certain conditions, one of which was that the ticket was to be considered the property of the company, to be delivered to them on the day after expiry; another was that the ticket and the deposit should be forfeited on breach of any of the conditions. A few days after expiry of the ticket the plaintiff delivered it to

¹ The obligations of a railroad company toward a passenger may rest either upon its public duty to carry him because he has paid fare, or upon some actual contract between him and the company (*Walsh v. Chicago, &c. R. R. Co.*, 42 Wis. 23); accordingly, a railroad ticket may operate either as a mere certificate or token issued by the money-taker of the company to the passenger, as evidence which the latter may produce to the conductor that he has paid fare (*Rawson v. Pennsylvania R. R. Co.*, 45 N. Y. 212), or as a writing setting forth the terms of an actual special contract for transportation (*Stone v. C. & N. W. R. Co.*, 47 Iowa, 82). For cases discussing the construction of tickets regarded as contracts, such as limited tickets, excursion tickets, commutation or season tickets, and the like, see *Hall v. Memphis, &c. R. Co.*, 9 Fed. Reporter, 585; *Hudson v. Kansas Pacific Ry. Co.*, ib. 877; *Ripley v. New Jersey, &c. R. R. Co.*, 31 N. J. L. 388; *Downs v. New York, &c. R. R. Co.*, 36 Conn. 287; *Keeley v. Boston, &c. R. R. Co.*, 67 Me. 163; *State v. Campbell*, 32 N. J. L. 309; *Boice v. Hudson River R. R. Co.*, 61 Barb. 611; *Gale v. Delaware, &c. R. R. Co.*, 7 Hun, 670; *Elmore v. Sands*, 54 N. Y. 512; *Davis v. Kansas City R. R. Co.*, 53 Mo. 317; *Dietrich v. Pennsylvania R. R. Co.*, 71 Pa. St. 432; *Ohio, &c. Ry. Co. v. Swarthwout*, 67 Ind. 567; *Ohio, &c. Ry. Co. v. Hatton*, 60 Ind. 12; *Pittsburg, &c. Ry. Co. v. Nazum*, ib. 533; *Alling v. Boston, &c. R. R. Co.*, 126 Mass. 121; *Hecks v. Hannibal, &c. R. R. Co.*, 68 Mo. 329; *Gregory v. Burlington, &c. R. R. Co.*, 10 Neb. 250; *Tarbell v. Northern Cent. Ry. Co.*, 24 Hun, 51; *Cresson v. Philadelphia, &c. R. R. Co.*, 11 Phila. 597; *Petrie v. Pennsylvania R. R. Co.*, 11 Reporter, 848; *Baltimore, &c. R. v. Campbell*, 36 Ohio St. 647.

Limited ticket on a street railroad. *McMahon v. Third Ave. R. R. Co.*, 47 N. Y. Superior Ct. 282.

(a) *Mouse's case*, 12 Co. 63.

the company, and claimed a return of the deposit; and it was held that the plaintiff could not recover the deposit. (*b*)

Ruinous and Insecure Railway Bridges, Viaducts, and Embankments.—Every railway company in the actual possession and occupation of its line of railway is responsible for the maintenance and preservation in a good state of repair of all its bridges, viaducts, and embankments, so that if any injuries are sustained either by persons travelling along a highway under a bridge or viaduct, (*c*) or by passengers travelling along the line, from the * ruinous and insecure state of such bridge or [* 577] viaduct, the railway company will be responsible for the injury, whether it arose from their own neglect in not providing needful reparations, or from original faulty construction of the fabric by their engineer or contractor. (*d*) If a railway embankment has been injured by some wholly unexpected and extraordinary flood, and the rails give way, and the passengers are injured without any neglect or default on the part of the company, the company is not responsible for the injuries that may be sustained by the passengers; (*e*) but every railway company is bound to construct and maintain its embankments and earthworks in such a manner as to be capable of resisting all the violence of the weather, which may be expected at some time or another, though rarely, to occur, and if it fails in this duty it will be responsible in damages for negligence. (*f*)

Notice of Action to Railway Companies.—When an act of parliament constituting and incorporating a railway company provides that no action shall be brought against the company for anything done or omitted to be done pursuant to the act, or in execution of the powers and authorities given by the act, unless previous notice in writing shall have been given by the party intending to prosecute such action, or unless such action shall have been brought within a certain limited period, the enactment does not in general extend to actions *ex contractu*, and

(*b*) *Cooper v. L. B. & S. C. Ry.*, 35 Law J. C. P. 4 Ex. D. 88. *v. Gt West. Ry.*, 135.

(*c*) *Kearney v. L. B. & S. C. Ry.*, 27 Law J. Exch. 417. (*e*) *Withers v. North Kent Ry. Co.*, L. R. 5 Q. B. 411; 6 Q. B. 759.

(*d*) *Grote v. Chester, &c. Ry. Co.*, 2 Exch. 251. (*f*) *Gt. West. Ry. Co of Canada v. Fawcett*, 1 Moore's P. C. C. N. s. 120; see also 8 & 9 Vict. c. 20, sect. 46. As to bridges at stations for passengers to cross by, see Longmore

does not restrain or affect the liability of the company upon contracts entered into by it in its character of a common carrier. The omission by a plaintiff, consequently, to give such notice does not preclude him from recovering damages against the company for its negligence or misconduct, or for a breach of those duties and obligations which result from the nature of its employment as a common carrier. (*g*) But where the parties were trying, in an action *ex contractu*, the right of the company to make certain charges under the particular provisions of their act of parliament, the action was considered to be brought for something done under the act, and notice of action was held to be necessary. (*h*)

Of the Parties to be made Plaintiffs in Actions against Carriers for the Loss of or Injury to Goods.¹—The action against a carrier for the loss of goods intrusted to him for conveyance should, in the absence of an express contract for the carriage of them, be brought by the owner of the goods; for with [* 578] him, as * the party damnified, is the implied contract for their safe conveyance deemed to be made. When goods are delivered to a carrier, in execution of a contract of sale, for the purpose of transmission to an intended purchaser, and no express contract founded upon a pecuniary consideration moving from the consignor has been entered into between the carrier and the consignor for the carriage of them, the law raises an implied promise for their safe conveyance in favor of the party in whom the right of property in the goods is at the time vested. If, therefore, the right of property and the risk of loss have, by a previous contract of purchase and sale, or a contract to send the goods in satisfaction and discharge of a debt due from the consignor to the consignee, passed to the consignee, the latter is the only party entitled to sue the carrier for an injury to the goods, whether such carrier be a carrier by land or a carrier by water, and whether he be named by the purchaser or chosen by

¹ Article on Consignees' right of action against carrier, by J. O. Pierce, 7 South. L. Rev. N. S. 255.

(*g*) Palmer v. Grand Junc. Ry. Co., Q. B. 747. See, however, the cases *ante*, 4 M. & W. 749; 7 Dowl. P. C. 232; p. * 522.
Carpue v. Lond. & Bright. Ry. Co., 5 (*h*) Kent v. Gt. West. Ry. Co., 3 C. B. 714; 16 L. J. C. P. 72.

the vendor. (*i*) If, on the other hand, from fraud or noncompliance with the requisites of the statute of frauds, no actual sale has taken place so as to transfer the right of property and the risk of loss from the consignor to the consignee, the consignor is the proper party to maintain the action. (*k*) So if a tradesman merely sends goods for approval to a particular customer, or on terms of "sale or return," or sends goods of the value of £10 and upwards, pursuant to an oral order or an oral contract of sale, to a person who has not given "earnest," or made a part payment, or accepted any part of the goods, and the contract is void by reason of non-compliance with the provisions of the statute of frauds, then, as there has been no actual sale so as to transfer the right of property and the risk of loss to the consignee, the consignor is the party to sue the carrier. (*l*) But when a special contract has been entered into between the carrier and the consignor, whereby the carrier, in consideration of a sum of money paid or agreed to be paid by the consignor as the price of the carriage of goods, agrees with him to convey them to the consignee, it is no answer to an action brought by the consignor against the carrier upon such special contract to say that he is not the owner of the goods. In such a case the action may be brought either by the consignor with whom the express engagement was made, or by the consignee as the owner of the goods in whose behalf it was made. (*m*)

* Where the plaintiff, the consignor, having received [*579] goods from Amsterdam to be transmitted to the consignee in Surinam, shipped them on board the defendant's vessel, upon a bill of lading which stated that the goods were shipped by the plaintiff, that they were to be delivered in Surinam to the consignee or his assigns, and that the freight was paid by the plaintiff in London, it was held by Lord Ellenborough that the defendant, after having signed such a bill of lading, could

(*i*) *Dawes v. Peck*, 8 T. R. 332; 3 H. & N. 510; 27 L. J. Ex. 401; *Duff Dutton v. Solomonson*, 3 B. & P. 584; *v. Budd*, 6 Moore, 469; *Stephenson v. Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Hart*, 1 M. & P. 357; 4 Bing. 476.
Brown v. Hodgson, 2 Campb. 36; *King* (*l*) *Coates v. Chaplain*, 3 Q. B. 489.
v. Meredith, ib. 639; *Fragano v. Long* (*m*) *Davis v. James*, 5 Burr. 2680;
 4 B. & C. 219; *Coxe v. Harden*, 4 East, *Bell v. Chaplain*, Hard. 321; *Moore v. Wilson*, 1 T. R. 659; *Dunlop v. Lambert*, 6 Cl. & Fin. 600.
 217; *Evans v. Nichol*, 4 Sc. N. R. 43.
 (*k*) *Coombs v. Brist. & Ex. Ry. Co.*

not bring the ownership of the goods into question. The consideration upon which the contract was founded moved from the plaintiff; the undertaking was made to him; and he was therefore entitled to maintain the action to recover the value of the goods, and would hold the sum recovered as a trustee for the real owner. (*n*) Where a laundress residing at Hammersmith was in the habit of employing a carrier to convey linen from Hammersmith to the consignee at London, and the carrier was paid by the laundress, it was held that the latter was entitled to maintain an action upon the special contract against the carrier for the loss of the goods by the way, although they belonged to the consignee. (*o*) In these cases the bailee of the goods, who has a special property in them, may enforce the express contract entered into with the carrier, unless his principal interferes to prevent him. "The rule is that either the bailor or the bailee may sue; and whichever first obtains damages, it is a full satisfaction." (*p*) But a settlement for loss or damage made with a person bringing the goods to the carrier, which person has no property or interest in the goods, will not be an answer to an action by the owner. (*q*)

Every person, as we have seen (*ante*, p. *522), who has been injured by the negligent performance of the work of carrying may maintain an action for damages against the carrier, although the work was done under a special contract to which he is no party. A servant, for example, may maintain an action against a railway company, or other carrier, for injuries sustained by him from the negligent management of a train by which he was a passenger, or from the negligent execution of the work of carrying, although the contract for his conveyance was made, and the hire or fare paid, by his master, the duty of carrying carefully being a duty which arises independently of the contract. (*r*) So where a railway company was bound by statute to carry the mails and the officers of the post-office who accompanied them, it was held that the company must exercise a

(*n*) *Joseph v. Knox*, 3 Campb. 320;
Sargent v. Norris, 3 B. & Ald. 277.

(*o*) *Freeman v. Birch*, 1 N. & M. 420.

(*p*) *Nicolls v. Bastard*, 2 C. M. & R.
 660.

(*q*) *Coombs v. Bristol & Ex. Ry.*, 3
 H. & N. 1; 27 L. J. Ex. 269.

(*r*) *Marshall v. York, Newcastle, &
 Berwick Ry. Co.*, 11 C. B. 655; and see
 the cases, *ante*, p. *522.

* reasonable care in performing the duty cast upon [*580] them by the statute, and were bound to carry safely; so that if any officer of the post-office was injured by the negligent management of their trains, he was entitled to maintain an action against them for damages, although the contract for his conveyance had been entered into between the company and the Postmaster-General. (s)

Joint Bailments to Common Carriers. — Where a box delivered to a carrier to be carried contained things belonging to each of the plaintiffs separately, but none in which they had a joint ownership, it was held that nevertheless there was a joint bailment in respect of which they might sue jointly. (t)

Parties to be made Defendants. — When goods have been delivered to the driver of a stage-coach to be carried, and have been lost by the way, an action *ex contractu* for negligence should be brought against the coach-proprietor, and not the mere servant or agent. (u) But as all who participate in a wrongful act are responsible *ex delicto* for the injurious consequences of it, the servant may be sued for the breach of duty as well as the master or the employer. The 8th section of the Carriers' Act (*ante*, pp. * 537, * 538) provides that the act shall not protect the coachman, guard, book-keeper, or other servants of the common carrier from liability for losses or injuries occasioned by their own personal neglect or misconduct.

Every railway company is responsible for the detention or conversion, by its officers and servants, of the property which has come into the hands of such servants and agents in the course of their employment in the business of the company. There must be some one authorized on the part of the company at every station to receive and deliver out goods, and to do things promptly that require immediate attention; and whoever is permitted by the company to have dominion over their stations, and to exercise authority over their property and over their porters and servants, will be presumed to be clothed with the necessary authority, and his acts, done within the scope of

(s) *Collett v. Lond. & North-Western Ry. Co.*, 16 Q. B. 989. 4 C. B. N. s. 318; 27 L. J. C. P. 335.

(t) *Metcalfe v. Lond. & Br. Ry. Co.*, 82. (u) *Williams v. Cranston*, 2 Stark.

his ordinary employment, will be binding on the company. Thus, where some young quicks were forwarded by railway to the plaintiff, and the general superintendent of the company, at the request of the plaintiff, in order to keep the quicks alive, permitted them to be put into the company's ground at the railway station, where they remained under the control and charge of the superintendent, and the latter subsequently refused to deliver them up to the plaintiff, it was held that [* 581] * the railway company was responsible for the unlawful detention of the property by their servant. (x)

The common carrier cannot qualify or limit his liability in respect of the negligence, want of skill, or carelessness of his servants and agents, in and about the carrying of the goods, by any private arrangement as to remuneration out of the profits of the business or otherwise, between himself and such servants or agents. "If a common carrier should allow his driver of the carriages some small things as perquisites, the master would, without all doubt, be still liable; and that is only a private agreement between master and servant, and only a different way of paying his servant's wages." (y)

Parties to be made Defendants — Carriage of Goods and Passengers over Distinct Lines of Railway. — We have already seen (*ante*, p. * 564) that where goods are delivered to and received by a railway company to be carried to a particular destination, the railway company receiving the goods is the party to be sued for the loss of or damage to them, although the loss or damage has been sustained on the line of a second or third railway company, to whom they have been delivered by the first railway company to be carried to their place of destination. The contract is made with the first railway company to whom they have been delivered, and to whom the hire for the entire journey has been paid; (a) but both companies may, under certain circumstances, become joint contractors for the conveyance of the goods. (b)

(x) *Taff Vale Ry. Co. v. Giles*, 23 Law J. Q. B. 43. *lins*, 7 H. L. C. 231; *Coxon v. Gt. West. Ry. Co.*, 5 H. & N. 274; 29 L. J. Ex. 165.

(y) *Page, J.*, Cas. temp. Hard. 90; and see *Hyde v. Trent & Mersey Nav. Co.*, 5 T. R. 397. (b) *Hayes v. South Wales Ry. Co.*, 9 Ir. Com. Law Rep. C. P. 474.

(a) *Brist. & Exeter Ry. Co. v. Col-*

The same rule prevails with regard to the passenger and his luggage, so that if one fare is paid and one ticket given for the entire journey, the contract is with the company issuing the ticket and receiving the money, and not with a second or third railway company over whose line the passenger is travelling in order to reach his destination. (*c*) And the company with which the contract is made will be liable for the negligence of such other railway company, the contract being that due care shall be used in carrying the passenger from one end of the journey to the other, so far as is within the compass of railway management. (*d*) But every railway company which allows its railway to remain open for public traffic is responsible to passengers who sustain injury from the line being unsafe and dangerous, * although such persons are conveyed along it in the [*582] carriages of some other company. (*e*)

Damages in Actions against Carriers. — In all actions against common carriers for unlawfully refusing to receive and carry a passenger or goods, substantial damages are recoverable, as there is an injury to a right; and if the plaintiff, in consequence of the wrongful refusal (*f*) of the common carrier to carry him, has been obliged to take a special conveyance and incur extraordinary expenses to reach the place to which he ought to have been carried, all such expenses (if reasonable) are recoverable, if claimed by the plaintiff, and specified in his claim as part of the damage he has sustained. So if a common innkeeper unlawfully refuses to receive and provide accommodation for a traveller, substantial damages are recoverable for the injury done to the plaintiff's right as a traveller and wayfarer to have shelter and accommodation in the common inn; and if he has been put to expense in seeking shelter and accommodation elsewhere, and has been obliged to hire conveyances to reach it, he is entitled to recover such special damage, if claimed. But the expenses

(*c*) *Mytton v. Mid. Ry. Co.*, 4 H. & N. 621; 28 L. J. Ex. 385; *Great Western Ry. Co. v. Blake*, 7 H. & N. 687; 31 L. J. Ex. 346; *Buxton v. North-Eastern Ry. Co.*, L. R. 3 Q. B. 549; 37 L. J. Q. B. 258.

(*d*) *Thomas v. Rhymney Ry. Co.*, L. R. 6 Q. B. 266; 40 L. J. Q. B. 89.

See, however, *Taylor v. Great Northern Ry. Co.*, *ante*, p. * 529; *Wright v. Midland Ry. Co.*, *ante*, p. * 521.

(*e*) *Birkett v. Whitehaven, &c. Ry. Co.*, 4 H. & N. 738; 28 L. J. Ex. 348.

(*f*) *Le Blanche v. London & N. W. Ry. Co.*, *infra*.

incurred must be such as he would probably have incurred on his own account. (*g*)

All persons are responsible for all the natural and legal consequences resulting from acts done by them in violation of the rights of others. The jury are entitled to look at all the surrounding circumstances, and at the conduct of the parties, to see where the blame is, and to assess the damages according to the way in which the parties have conducted themselves. (*h*)

The amount of damages recoverable from common carriers for loss of or injury to goods, is regulated and controlled by the several acts of parliament requiring consignors in certain cases to declare the value of the article at the time it is delivered to the common carrier to be carried (*ante*, p. * 553.) No greater damages than £50 are to be recovered for loss of or injury to a horse through the neglect or default of a railway company or its officers; £15 per head for neat cattle; and £2 per head for sheep and pigs; unless the person sending or delivering the animals to the company shall at the time of delivery have declared them to be of higher value. (*i*)

Proof of the value and of the amount of injury lies in all cases upon the person claiming compensation. If the value of horses has been declared at the time of the delivery of the animals to a railway company to be carried, and the contract between the parties has been made upon that basis, the plaintiff is bound by his declaration of value, and cannot recover beyond the declared value. (*k*)

Generally speaking, when articles of merchandise such as corn, hops, hemp, &c., are delivered to a carrier to be carried to a market town, and the carrier fails to deliver them in the ordinary course, and the goods come to a fallen market, the difference between the marketable value of the goods at the time they would have been sold if they had been carried according to contract, and their marketable value at the earliest period at which they could have been brought to market after their delivery to

(*g*) *Le Blanche v. London & N. W. Ry. Co.*, 1 C. P. D. 286, C. A.; *Millen v. Brash*, 8 Q. B. D. 35.

(*h*) *Davis v. North-Western Ry. Co.*, 4 Jur. N. s. 1303.

(*i*) 17 & 18 Vict. c. 31, sect. 7.

(*k*) *McCance v. London & North-Western Ry. Co.*, 7 H. & N. 477; 31 Law J. Exch. 65; 34 ib. 39.

the consignee, will be the measure of damages recoverable. (*l*) If the goods have been lost altogether, the consignee is not restricted to the value of the goods at the place where they were delivered to the carrier to be carried; but if their marketable value was greater at the place of destination than at the place of consignment, the consignee is entitled to recover that difference, as being a loss likely to arise in the ordinary course of trade. (*m*) If there is no market at the place of delivery, the damages must be ascertained by taking into consideration, in addition to the cost price and expense of transit, the reasonable profit of the importer. Where goods were delivered to a carrier by sea to be carried from Glasgow to Vancouver's Island, and on the arrival of the ship at the latter place they could not be found, it was held that the true measure of damages was the cost of replacing the lost articles in Vancouver's Island, with interest at 5 per cent on the amount until judgment, by way of compensation for the delay. (*n*)

In an action against a common carrier for loss sustained by long delay in the delivery of articles of merchandise intrusted to him to be carried, whereby the consignee had lost the season for selling them to advantage, and the marketable value of the articles was seriously diminished, it was held that the carrier was answerable for this loss, it being such as might naturally be expected to result from great delay in delivering articles of merchandise. (*o*) So where a railway company contracted with the plaintiff, who showed goods at agricultural shows, to carry the goods to another show-ground on a particular day, the court, although nothing was said by the parties as to the purpose for which the goods were to * be carried, inferred [*584] that the defendants must have known it, and that the plaintiff was entitled to damages for loss of profit which was a natural result, and that no evidence was necessary to show that he had a prospect of making profit at the particular show. (*p*)

(*l*) *Rice v. Baxendale*, 30 L. J. Ex. 393; *British Columbia Saw Mill Co. v. Nettleship*, L. R. 3 C. P. 499.

6 B. & S. 484; 31 L. J. Q. B. 154.

(*m*) *O'Hanlan v. Gt. Western Ry. Co.*, 9 C. B. N. s. 632; 30 L. J. C. P. 233.

Co., *supra*.

(*p*) *Simpson v. L. & N. W. Ry. Co.*,

(*n*) *Collard v. S. E. Ry. Co.*, 30 L. J. 1 Q. B. D. 274.

But where shoe manufacturers agreed to supply a London firm with shoes for the French army, to be delivered on the 3rd of February, and gave notice that they were under contract to deliver on the 3rd, and that if not, the shoes would be thrown on their hands, but not that there was anything exceptional otherwise in the contract, it was held that the carriers were not liable for the difference between the price the consignors had to sell the shoes at, and the agreed price, as the difference was extraordinary, and it was not such a loss as naturally arose or could be reasonably contemplated. (*g*)

When the consignor has been guilty of no intentional deception to conceal the risk, and his own conduct or omission to declare the nature and value of the article has not in any way conduced to the loss, but the loss has been caused solely by the negligence and want of care of the common carrier, the latter is bound by the common law to make compensation for the loss so occasioned, to the extent, at all events, of the apparent and presumable value of the article at the time it was bailed to him to be carried. But he is not, it seems, responsible for any extraordinary or unusual value which may have accidentally been imparted to it, and which could not, from the apparent nature and general character and appearance of the thing, be fairly presumed to exist. Thus where the plaintiff had put a £50 bank-note into his carpet-bag amongst his linen and wearing apparel, and got on a coach and delivered the carpet-bag to the coachman, and on the arrival of the coach at its place of destination the bag was missed and never afterward seen, the jury gave a verdict for the value of the linen and wearing apparel, but not for the value of the note, and the court afterward refused to increase the verdict by the amount of the note. (*r*) In other cases, however, the plaintiff has recovered the full value of the article lost. (*s*)

But the plaintiff is not entitled to recover damages for loss of

(*g*) *Horne v. Midland Ry.*, L. R. 8 C. P. 131; *Albinger v. Armstrong*, L. R. 9 Q. B. 473; *The Parana*, L. R. 1 P. D. 118.

(*r*) *Miles v. Cattle*, 4 M. & P. 630; 6 Bing. 743.

(*s*) *Sleat v. Fagg*, 5 B. & Ald. 342; *Walker v. Jackson*, 10 M. & W. 161; 2 M. & P. 342; see *Angell on Carriers*, sect. 262.

wages of workmen kept unemployed by reason of the non-arrival of the goods, or for loss of profit which might have been made if the goods had been delivered in due course, if the carrier had no notice of the purpose for which the goods were wanted; (t) *and if the carrier held the goods at the [*585] time of the loss in the character of a warehouseman, he cannot in general be made responsible for more than the actual value of the goods. (u)

Where a warehouseman warehoused part of the goods at a place other than that agreed upon, and they were destroyed without negligence, it was held that the damages were not too remote. (x) And so where an innkeeper contracted to stable horses, and then let the stables to another, who turned out the plaintiff's horses, which caught cold and were damaged, such damage was held not too remote. (y)

Where the plaintiff complained that the defendant had hired him to carry a load of timber to Ipswich, and that he carried the timber there and asked the defendant where it was to be deposited, but the defendant would give no directions, and made the plaintiff's horses, which were heated, stay so long in the wagon that they took cold, and some of them died, and the rest were spoiled, it was held that the immediate and proximate cause of the injury to the horses was the plaintiff's own neglect in not having them taken out of the wagon and put into a stable, and that the original wrongful act of the defendant, in not finding a place of deposit for the timber, was not sufficiently connected with the loss of the horses to render the defendant responsible for such loss. (z)

If the plaintiff, being the consignor of horses or other articles, makes a declaration of value which is below their real value, in order to get them carried at a lower rate of charge, he will be

(t) *Le Peinteur v. S. E. Ry. Co.*, 36 Law T. R. 170; *Hadley v. Baxendale*, 23 L. J. Ex. 179; *Watson v. Amberg. &c., Ry. Co.*, 15 Jur. 448; and see *Horne v. Midland Ry. Co.*, L. R. 8 C. P. 181; 42 L. J. C. P. 59.

(u) *Henderson v. N. E. Ry. Co.*, 9 W. R. 519.

(x) *Lilley v. Doubleday*, 7 Q. B. D. 510.

(y) *McMahon v. Field*, 7 Q. B. D. 591; disapproving *Hobbs v. L. & S. W. Ry. Co.*, L. R. 10 Q. B. 111, where plaintiff's wife catching cold was held too remote.

(z) *Virtue v. Bird*, 2 Lev. 196.

bound by his declaration of value, and cannot recover more than he has himself declared. (*a*)

Damages in respect of Delay in Delivery.—If by reason of goods not having been delivered in due time, the season for finding customers for them has passed away, and they are consequently of less value to the plaintiff, the deterioration in value may be considered in estimating the amount of damage, but not the profit which would have been made upon the sale of them if they had been delivered at the proper time; (*b*) or where the goods consist of machinery, the presumed profit which [*586] would have been made * by the use of them during the time it took to replace them. (*c*) The right measure is the market value of the goods at the place and time at which they ought to have been delivered, or if there is no market, then the price at the place of manufacture, with the cost of carriage and a reasonable sum for importer's profit. (*d*) Thus, where the plaintiff bought caustic soda of the defendant, to be shipped at a certain time, which the defendant neglected to do, and there was no market for caustic soda, it was held that the plaintiff was entitled to recover the increased freight and insurance which had become necessary by reason of the defendant's delay, and also the loss of his profit upon a re-sale of the soda to A, but not the amount of damages which he (the plaintiff) had paid A on a sub-sale made by him to a consumer of the article. (*e*) Hotel expenses incurred by the consignee while waiting for the delivery of the goods by the carrier are not recoverable. (*f*)

Damages in Cases of Personal Injuries.—A new trial will be granted in an action for personal injuries arising from a railway accident, where the damages found by the jury are so small as to show that they must have omitted to take into consideration

(*a*) *McCance v. Lond. & North-West. Ry. Co.*, 34 L. J. Ex. 39.

(*b*) *Wilson v. Lanc. & York. Ry. Co.*, 9 C. B. N. s. 642; *Simmons v. South-Eastern Ry. Co.*, 7 Jur. N. s. 849; *Gt. Western Ry. Co. v. Redmayne*, L. R. 1 C. P. 329.

(*c*) *British Columbia Saw Mill Co. v. Nettleship*, *supra*.

(*d*) *O'Hanlan v. Gt. West. Ry. Co.*, 34 Law J. Q. B. 154.

(*e*) *Borries v. Hutchinson*, 34 L. J. C. P. 169.

(*f*) *Woodger v. Gt. Western Ry. Co.*, L. R. 2 C. P. 318.

some of the elements of damage, (*g*) as well as where they are unreasonably large. The jury are to consider "what the plaintiff's income would probably have been, how long that income would probably have lasted, and all other contingencies to which a practice is liable." (*h*) The measure of damages is the loss of time, expense incurred, pain and suffering, and permanent injury causing pecuniary loss. (*i*) As to damages under Lord Campbell's act, see Addison on Torts (5th edition, by L. W. Cave, Q.C.), p. 550.

Claims against a Common Carrier for refusing to carry should show that the defendant is a common carrier of goods plying for hire between the place where the goods were tendered to him for conveyance and the place to which they were addressed; that the plaintiff tendered to the defendant certain goods to be carried from the one place to the other; that the defendant had room and the means of receiving and carrying them, and the plaintiffs were ready and willing to pay him his customary hire; yet the defendant would not receive and carry the goods, whereby the plaintiffs were put to great loss and inconvenience, setting forth any special damage that may have been sustained, and concluding with a claim for damages. (*m*)

***Plea of Not Guilty.** — Before the Judicature Acts, the [* 587] plea of not guilty in actions for negligence operated as a denial only of the wrongful act alleged to have been committed by the defendant, and no defence other than such denial was admissible under that plea. Thus in actions against a carrier for loss of or damage to goods, the plea of not guilty operated as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received, or of the plaintiff's property in the goods. (*n*)

Special Defences. — Where the defendant denies the receipt of the goods to be conveyed by him as a common carrier, or denies his receipt of them altogether, he must by special defence

(*g*) *Phillips v. L. & S. W. Ry.*, 5 Q.

B. D. 78.

(*h*) *Per* Jessel, L. J. *ib.*

(*i*) *Blake v. Mid. Ry.*, 18 Q. B. 93;

Armstrong v. S. E. Ry., 11 Jur. 758.

(*m*) *Pickford v. Grand Junction Ry.*

Co., 8 M. & W. 372.

(*n*) Reg. Gen. Hil. Term, 16 Vict.;

1 Ell. & Bl. App. lxxxii., lxxxiii.

allege that he did not receive the goods to be carried as in the claim mentioned. If the plaintiff has claimed against him upon his liability as a common carrier, insuring the safe conveyance of the things he carries, and it appears that the things were delivered to him under a special contract, the cause of action will be disproved under this defence. (*o*) If he denies the plaintiff's title or right to the possession of the property, he must allege that the property was not at the time he received it to be carried, the property of the plaintiff; (*p*) or, admitting that the plaintiff was the owner of the property at the time it was delivered to him, he may show that the plaintiff's right to the possession of it ceased or had been determined, and that some third party had since the bailment become entitled to the property and had demanded it of the defendant. (*q*)

If the defendant relies upon the Common Carriers' Act, he must by his defence show that the articles delivered to him for conveyance were of the description mentioned in the statute, and that at the time of the delivery of them to him to be carried, the value and nature of the goods were not declared by the plaintiff. (*r*)

Evidence at the Trial — Proof of the Bailment. — To charge the common carrier for the loss of goods, however occasioned, it must, of course, be shown that the goods were either actually or constructively bailed to him or his servants to be carried. They must either have been delivered into his hands or into the hands of his servant or agent, or some person authorized by him to receive them. If they were merely deposited in the [**588*] yard of an inn, or upon a **wharf* to which the carrier resorts, or were placed in his cart, vessel, or carriage, without his knowledge and acceptance, or that of his servants or agents, there has, of course, been no bailment or delivery of the goods to him, (*s*) and he cannot, consequently, be made respon-

(*o*) *White v. Gt. Western Ry. Co.*, 2 C. B. N. s. 7.

(*p*) *Cheesman v. Exall*, 6 Exch. 341.

(*q*) *Sheridan v. New Quay Co.*, 4 C. B. N. s. 618; *Europ. & Austral. R. M. Co. v. R. M. St. P. Co.*, 30 Law J. C. P. 247.

(*r*) *Pianciani v. London & South-Western Ry. Co.*, 18 C. B. 229; *Hart v. Baxendale*, 6 Exch. 789; 21 L. J. Exch. 123.

(*s*) *Selway v. Holloway*, 1 Ld. Raym. 46; *Buckman v. Levi*, 3 Campb. 414; *Lovett v. Hobbs*, 2 Show. 128.

sible for the loss of them. If the common carrier's servant has been induced by the consignor to depart from the usual course of dealing, and to receive goods which he was not bound to receive and carry, under circumstances of hazard known to the consignor, but not disclosed to the carrier's servant, or on terms different from those on which alone he was authorized to receive them, the carrier will either not be responsible for the loss of the goods, as never having been delivered to him, or at all events not on his common law liability of an insurer. (*t*) If the consignor has made a private bargain with the driver of the cart or coach of the common carrier for the conveyance of a parcel for a gratuity which was not intended by the parties to find its way into the pocket of the carrier, there has been then no bailment to the latter, and he is not, consequently, liable in case the parcel is lost. The bailment in such a case is a bailment to the driver alone, and he alone is responsible for the loss. (*u*)

If the plaintiff has merely hired the cart or carriage of the common carrier, and has sent his own servants with the goods to take charge of them, and there has been no actual delivery or bailment of the goods to the carrier, the latter is not responsible for their safety. (*x*) If a passenger travelling on the outside of a stage-coach has kept a parcel or package in his own hands and under his own care, or taken it with him into the interior of the vehicle without the knowledge of the carrier or his servants, and the thing is lost, the carrier is not responsible for the loss, as the article was never delivered to him or to his servants, or in any way intrusted to his or their keeping. But if the thing has been tendered to the carrier for conveyance, and the latter has directed the passenger to place it in or upon any portion of the vehicle, there has been a constructive bailment or delivery and acceptance of the goods, so as to charge the carrier for the loss of them. If luggage is placed with the knowledge of the carrier or his servants under the seat on which the passenger sits, the carrier will be responsible for its safe conveyance and

(*t*) *Edwards v. Sherratt*, 1 East, 604; *Bignold v. Waterhouse*, 1 M. & S. 259; *Slim v. Gt. Northern Ry. Co.*, 23 Law Middleton *v. Fowler*, 1 Salk. 282.
J. C. P. 166.

(*x*) *East India Co. v. Pullen*, 2 Str.

(*u*) *Butler v. Basing*, 2 C. & P. 613; 690.

delivery to the passenger at the place of destination. (*y*)
 [* 589] A delivery of goods to a person sent or appointed * by
 the carrier to receive them is, of course, a delivery to
 the carrier himself. (*z*)

Proof of a Special Contract. — We have seen that every special contract, notice, or condition respecting the acceptance and carriage of goods by railway and canal companies, must be signed by the party sought to be affected thereby (*ante*, p. * 555). And the signature must be fairly obtained; for where a person who was unable to read was told by a clerk of the company that the paper was a mere matter of form and of no consequence, and he signed the paper, relying upon this assurance, it was held that the paper so foisted upon him was not binding. (*a*)

If the plaintiff has declared against the defendants as common carriers, alleging that they received the goods to be carried by them as common carriers, and it turns out that they were received under a special contract (*ante*, p. * 555), the evidence will fail to support the declaration, unless it be shown that the special contract was unreasonable and void. (*b*)

Proof of Felony by a Carrier's Servants. — When, in consequence of the plaintiff's not having paid the extra price for lost articles of value, he is not entitled to recover unless he shows that the things have been stolen by the carrier's servants, it is not enough for him to make out a probable case against some one or more of the carrier's servants. He must show that the things were lost under circumstances wholly inconsistent with their having been stolen by a stranger. (*c*)

Proof of Jus Tertii by a Common Carrier. — A carrier who has received goods from a consignor is not estopped from denying the title of the latter to the goods. Common carriers are bound to receive goods properly tendered to them for carriage, and can

(*y*) *Richards v. London, Brighton, &c. Ry. Co.*, 7 C. B. 848; 18 Law J. C. P. 251; and other cases, *ante*, p. * 546. 2 C. B. N. S. 17; *Latham v. Rutley*, 2 B. & C. 20.

(*z*) *Syms v. Chaplin*, 5 Ad. & E. 634; 1 N. & P. 129. (*c*) *Metcalfe v. London & Brighton, &c. Ry. Co.*, 27 Law J. C. P. 333.

(*a*) *Simons v. Gt. Western Ry. Co.*, 2 C. B. N. S. 620. See also *M'Queen v. G. W. Ry. Co.*, *ante*, p. * 551; *Vaughton v. L. & N. W. Ry. Co.*, *ante*, p. * 552.

(*b*) *White v. Gt. Western Ry. Co.*,

make no inquiries into the ownership of them. "The law protects them against the real owner if they have delivered the goods in pursuance of their employment without notice of his claim. It ought equally to protect them against the pseudo owner, from whom they could not refuse to receive the goods in the event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a common carrier furnishes ample ground for so holding." (*d*)

Contracts for the Transmission of Messages by Electric Telegraph — Limitation of Liability.¹— Acts of parliament under which * electric telegraph companies were incor- [* 590] porated, generally provided that the telegraph should be open for the sending and receiving messages by all persons alike, without favor or preference, subject to any reasonable regulations made by the company. It was held to be a reasonable regulation for the company to stipulate that they would not be responsible for mistakes made in the transmission of messages, unless the messages were repeated and an additional payment made for such repetition of the message. (*e*) If a telegraph company negligently made a mistake in the transmission of a message, it was liable to the sender only, and not to the receiver, although the latter may have acted on the message so erroneously transmitted, and may have sustained damage by so doing. (*f*) The government, through the Postmaster-General, became the purchasers of the telegraph companies, under the 31 & 32 Vict. c. 110; 32 & 33 Vict. c. 73;

¹ For the law governing telegraph companies and telegraphic communication generally, see Abb. Dig. Corp. tit. *Telegraph Companies*; Allen, *Telegraph Cases*; Scott. & J. *Telegraphs*; Redf. Carr. sects. 541-574; U. S. Dig. tit. *Telegraph Companies*; see further, *Strauss v. Western Union Tel. Co.*, 8 Biss. 104; *Behm v. Western Union Tel. Co.*, ib. 131; *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; *Relle v. Western Union Tel. Co.*, 55 Tex. 308.

Whether telegraphic companies are common carriers, and what communication by telegraph may constitute a contract, see *ante*, p. *56, American note; *Brinkman v. Hunter*, 73 Mo. 172.

(*d*) *Sheridan v. New Quay Co.*, 4 C. B. N. s. 618; 28 Law J. C. P. 58; *Cheesman v. Exall*, 6 Exch. 341, overruling *Iaclouch v. Towle*, 3 Esp. 114.

(*e*) *McAndrew v. Elect. Tel. Co.*, 17 C. B. 13.

(*f*) *Playford v. The United Kingdom Electric Telegraph Company, Limited*, L. R. 4 Q. B. 706; 38 L. J. Q. B. 249; *Dickson v. Reuter's Tel. Co.*, 2 C. P. D. 62; 3 C. P. D. 1, C. A.

33 & 34 Vict. c. 88. By the first of these acts (sect. 6) and by the last (sect. 8), agreements, &c., made with the companies may be enforced against the Postmaster-General. Post-office officials cannot, however, be held liable for negligence, for they are the servants of the government or the public. (*g*)

(*g*) See Horace Smith on Negligence, p. *134, note (*p*).

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